139-344

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~145.~~ 174

SAMUEL W. FOWLER, APPELLANT,

vs.

ROBERT HAMILL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 17, 1885.

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139-541

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INDEX.

	Original.	Print.
Subpœna	1	1
Marshal's return	2	1
Bill of complaint	3	3
Notice of appearance	10*a*	6
Consent to substitution	10*c*	7
Plea	11	7
Replication	14	9
Notice to take testimony for complainant	15	9
Evidence for complainant	16	10
Testimony of August W. Almqvist	19	11
Dubois D. Parmelee	28	17
Alfred Ivers	40	24
Stipulation as to submission of plea, &c.	45	28
Exhibit McCloskey's Patent.—Letters Patent No. 220,767, granted John McCloskey, Oct. 21, 1879	47	28
Exhibit—"Decision Board of Examiners in Chief, in the matter of McCloskey's application."	53	32
Notice to take testimony for defendant	59	35
Evidence for defendant	60	36
Testimony of Michael Geary	61	36
Michael Hanrahan	66	39

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 24, 1888.

I hereby deputize Gilbert E. Rogers to serve the within writ.
(S'g'd) HENRY E. KNOX,
2½ *U. S. Marshal, S. D. of N. Y.*

(File mark :)

U. S. circuit court. Filed Dec. 12, 1881. Joseph M. Deuel, clerk.

3 Circuit Court of the United States for the Southern District of New York. In Equity.

JOHN MCCLOSKEY, Complainant, *against* R. HAMILL, Defendant.

To the honorable the judges of the circuit court of the United States for the southern district of New York :

John McCloskey, a resident and citizen of the State of New York and of the said southern district of New York, brings this his bill of complaint against R. Hamill, a resident and citizen of said southern district of New York—the said R. Hamill resides in Greenburgh, otherwise called Dobbs Ferry, in the county of Westchester and State of New York—and thereupon your orator complains and says that heretofore and before the twenty-first day of October, A. D. one thousand eight hundred and seventy-nine, your orator, John McCloskey, being then a citizen of the United States, was the original, true, and first inventor or discoverer of a certain new and useful invention, to wit, "an improvement in soft metal traps," and that the said invention was not known or used by others before his invention or discovery thereof.

And that your orator did reduce the said invention to practice in the year A. D. 1869, and thereafter at all proper times and places and under all proper circumstances did assert for himself and did
4 insist upon all rights and privileges whatsoever as inventor and owner of said invention, always intending and proposing to secure the same to himself by letters patent of the United States as soon as he should be able so to do, and that he, your said orator, did so apply for such letters patent as early as he by great care and energy and persistence was able to do, and that the said invention was not at the time of the application for letters patent therefor in public use or on sale with the consent or allowance of the said John McCloskey as the inventor and discoverer thereof, contrary to the provisions of the statute in such case made and provided.

That the said John McCloskey in due form of law made application in writing to the Commissioner of Patents of the United States for the granting of letters patent for said invention, and paid into the Treasury of the United States the fees required by law, and then and there duly complied in all other respects with all the necessary conditions and requirements of the statutes of the United States in such case made and provided prior to the granting of the letters patent herein mentioned.

That thereupon, and after due proceedings had, the board of examiners-in-chief of the United States Patent Office, a duly organ-

ized tribunal appointed by the President of the United States under and by virtue of the statutes in such case made and provided, and exercising judicial powers within the Patent Office, and composed of persons of competent legal knowledge and scientific ability, did examine his said invention in view of all preceding plumbers' traps of soft metal, and in view of the whole of the prior state of the art, and did affirm and determine in due exercise of their judicial functions that complainant's said invention was a new and useful invention within the meaning of the patent laws of the United States, and that the same was structurally, essentially, and substantially different from any and all devices known in the art prior to the invention thereof by your orator as aforesaid, all as by a certi-
5 fied copy of the decision of the said board of examiners-in-chief in said matter, now in your orator's possession and ready to be produced in court if required, will more fully appear.

That on the twenty-first day of October, A. D. 1879, letters patent of the United States, bearing date on that day, and numbered 220,767, were issued to the said John McCloskey (your orator aforesaid) according to law, whereby there was granted to him and his heirs, executors, administrators, or assigns, for the term of seventeen years from the twenty-first day of October, A. D. 1879, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the invention aforesaid, a description whereof was given in the words of the said John McCloskey in the schedule annexed to the said letters patent and making part of the same.

That the said letters patent were issued in the name of the United States of America, and were signed by the Secretary of the Interior, and were countersigned and sealed with the seal of the Patent Office by the Commissioner of Patents, and were numbered 220,767, as aforesaid, and were issued and delivered to your orator, the said John McCloskey.

And that your orator, the said John McCloskey, put the said invention into practical effect.

And your orator prays that the said letters patent and the schedule annexed thereto and forming part of the same may be deemed and taken as part of this bill of complaint, and to the original of which, or duly authenticated copies thereof now in your orator's possession and ready to be produced if required, your orator prays leave to refer.

And your orator, further shows that your orator, the said John McCloskey, has, ever since the date of the said letters patent,
6 been and now is entitled to all the rights, interests, and privileges thereby secured unto him in and to the said invention or discovery in the said letters patent particularly set forth, and is now and ever since the date of the said letters patent has been entitled to the exclusive use of the said invention and improvement.

And your orator further shows unto your honors that the said invention or discovery so patented as aforesaid unto him, the said John McCloskey, is of very great utility, which said utility arises from

many and great differences which exist between the trap so patented to your orator and other traps previously known, including those differences which exist between the die-drawn metal of which your orator's said invention of "a die-drawn seamless trap of soft metal" is composed and the metal or material of which plumbers' traps were made before the date of the invention of your orator's improvement so patented as aforesaid, and also because of other peculiarities and distinguishing features of said invention or improvement so patented to your orator, the said die-drawn seamless trap of soft metal so patented to your orator possessing and having combined in it numerous structural properties or inherent characteristics and distinguishing features which are not found together in any other plumbers' trap, and which render your orator's said invention, for all the uses and purposes of a plumbers' trap, very far superior in each and all the essentials of a plumbers' trap to any and all plumbers' traps previously known.

And your orator further says that the said invention so patented to him as aforesaid has been extensively introduced into public use, and that your orator would, but for his wrongful acts and doings of the said defendant, R. Hamill, and others acting in concert with him, have made large gains, profits, and advantages from the practice, use, and sale of the said invention.

7 And your orator would, but for the wrongful acts and doings of the said defendant and others acting in concert with him, now be enabled to use the said improvement in soft metal traps to which your orator is entitled to the exclusive right as aforesaid with profit and advantage, but that by the said wrongful acts and doings of said defendant and others acting in concert with him he is now prevented and hindered from so doing.

And your orator further shows unto your honors, upon information and belief, that the said defendant, R. Hamill, did use the invention patented as herein set forth for his own gain and profit, well knowing the premises and the rights and privileges secured unto your orator, and in order to deprive your orator of the profits, benefits, and advantages which might and otherwise would have accrued to your orator at Greenburgh, otherwise called Dobbs Ferry, in the county of Weschester and State of New York, and elsewhere in said southern district of New York, and without the license and permission of your orators, has, since the twenty-first day of October, A. D. 1879, unlawfully and wrongfully made or practiced and caused to be made or practiced, sold or caused to be sold, used or caused to be used, the said invention substantially as described and set forth in the herein specified letters patent No. 220,767, issued to John McCloskey as aforesaid, and the exclusive right to which is secured to your orator, as hereinbefore set forth, and which said unlawful practicing, use, and sale by the defendant as aforesaid is a violation and infringement of your orator's exclusive rights and privileges, and that the said defendant has derived and received and is still deriving and receiving from such unlawful use and practice great gains and profits, but to what amount your orator is ignorant and

cannot set forth, but your orator prays that the defendant may be required to make a disclosure of all such gains and profits.

And your orator in like manner avers that the defendant, notwithstanding the objections of your orator, hath persisted in such unlawful use and practice, and hath not paid to your orator
8 such gains and profits as the said defendant has actually made, by means whereof your orator is and has been greatly injured, and is now prevented from putting the said invention or discovery into fully remunerative operation, and is deprived and prevented from receiving the gains and profits to which he is lawfully entitled from the exclusive rights and privileges so granted and secured to him as aforesaid, and which he would have derived and acquired and would now derive and acquire but for the said wrongful acts of the said defendant.

And your orator prays that the said defendant may be compelled by a decree of this honorable court to account for and pay over unto your orator all such gains and profits as have accrued or arisen to or been earned or received by the said defendant, and all such gains and profits as your orator would have received but for the said wrongful acts and doings of the said defendant, and all damages your orator has sustained thereby, and that this honorable court will assess the same or cause the same to be assessed under its direction and increase the same in its discretion as provided by law.

And that said defendant, his associates, attorneys, solicitors, clerks, servants, agents, and workmen may be perpetually enjoined and restrained by the decree of this court from directly or indirectly making or practicing or causing to made or practiced, using or causing to be used, or vending to others to be used in any manner any device containing or embodying the said invention set forth and described in the said letters patent issued as aforesaid, and from infringing upon or violating the said letters patent by the manufacture, use, or sale of the said invention in any way whatsoever.

And that the said defendant may be decreed to pay the costs, charges, and disbursements of this suit, and that your orator
9 may have such other relief as the equity of the case may require and as to your honors may seem meet.

To the end, therefore, that the said R. Hamill may, if he can, show why your orator should not have the relief hereby prayed, and may, upon his corporal oath and according to the best and utmost of his or his clerks', agents', servants', or workmen's several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the allegations, statements, and averments of this bill of complaint as fully and particularly as if the matters therein were here repeated paragraph by paragraph and they were thereto in all respects severally and specifically interrogated, may it please your honors to grant to your orator a writ of subpœna of the United States of America issuing out of and under the seal of this honorable court, directed to the said defendant, R. Hamill, commanding him to be and appear in this honorable court, then and there to answer all and

singular the premises and to perform and abide by such order and decree herein as to this court may seem required by the principles of equity and good conscience.

May it please your honors to grant to your orator a provisional or preliminary injunction issuing out of and under the seal of this honorable court, enjoining and restraining the defendant, his associates, attorneys, solicitors, clerks, servants, workmen, and agents, to the same purport, tenor, and effect as hereinbefore prayed for in regard to the said perpetual injunction.

And your orator will ever pray, etc.

JOHN McCLOSKEY.

JAMES A. WHITNEY,
Sol'r & of Counsel.

(Endorsed:) U. S. circuit court, southern dist. of New York. In equity. John McCloskey ag'st R. Hamill. Bill. James A. Whitney, sol'r for compl't, 140 Nassau St., N. Y. city. U. S. circuit court. Filed. Sep. 9, 1881. Joseph M. Deuel, clerk.

10 UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF NEW YORK, } *ss:*
City and County of New York, }

On this 9th day of September, 1881, before me came John McCloskey, to me personally known, who, being by me duly sworn, did depose and say that he is the complainant in the foregoing bill of complaint named, and that he has read the said bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN McCLOSKEY.

Sworn to before me this 9th day of September, 1881.

JAS. H. MATTHAEL,
Notary Public, N. Y. Co., 157.

10*a* Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

JOHN MCCLOSKEY *vs.* R. HAMILL.

SIR: You will please to take notice that I am retained by and hereby appear for R. Hamill, the defendant above named, and in obedience to a subpœna issued out of this court and returnable on this day.

Dated Oct. 3rd, 1881.

(S'g'd) HOWARD A. SPERRY,
Solicitor for Def't, 229 B'way, N. Y. City.

To Jas. A. Whitney, Esq., solicitor for compl't, & J. M. Deuel, clerk.

(Endorsed:) U. S. circuit court. John McCloskey *vs.* R. Hamill. Notice of appearance. Howard A. Sperry, solicitor for def't,
10*b* 229 B'way, N. Y. U. S. circuit court. Filed Oct. 3, 1881. Joseph M. Deuel, clerk.

10*c* United States Circuit Court, Southern District of New York. In Equity.

JOHN MCCLOSKEY, Complainant,
against
R. HAMILL, Defendant.

I hereby consent that John McCloskey substitute any person he pleases as solicitor and of counsel in the above-entitled suit, I having heretofore, on or about the thirteenth day of this present month, for good and sufficient reason, notified the said John McCloskey that from and after said date I should not act as his solicitor or counsel in said suit, and that I should not be responsible for anything that might be done or occur in the said suit after the said date.

May 22nd, 1882.

(Signed) JAMES A. WHITNEY.

10*d* (Endorsed:) U. S. circuit court. John McCloskey *vs.* Robert Hamill. Consent to substitute, &c. U. S. circuit court. Filed Nov. 14, 1882. Joseph M. Deuel, clerk.

11 *The Plea of R. Hamill to the Bill of Complaint of John McCloskey, Complainant.*

Circuit Court of the United States, Southern District of New York, Second Circuit. In Equity.

JOHN MCCLOSKEY, Complainant, *vs.* ROBERT HAMILL, Defendant.

The defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, for plea thereunto, says that the said complainant has no claim or cause of action, equitable or otherwise, against this defendant, because that letters patent of the United States for alleged new and useful "improvement in soft metal traps" were, on or about the 21st day of October, A. D. 1879, issued to John McCloskey, the said complainant, bearing date on that day, and numbered 220,767, which letters patent are mentioned in said bill.

And, on information and belief, he denies that the complainant was or is the original or first inventor or discoverer of the alleged improvement in metal traps mentioned, described, or referred to in said bill of complaint or the letters patent therein referred to or of any material or substantial part thereof, and alleges and charges

that long before the said patented invention by said complainant all of the substantial and material parts thereof were in public use
12 in the United States, and were so used in various places throughout the United States, and were publicly constructed, dealt in, or seen by sundry persons in the United States, and among many other such persons and places J. A. Lowe, of the city of New York, in the State of New York, who manufactured and sold and caused to be manufactured and sold large numbers of such metal traps in said city and elsewhere throughout the United States.

And this defendant, upon information and belief, further alleges that before said patented invention by the complainant, and long before his alleged application for said letters patent, the improvement therein described and claimed had been patented and described in the following letters patent granted in the United States, to wit: Letters patent No. 25572, for an "improvement in moulding water traps," granted J. A. Lowe, bearing date September 27th, 1859.

Letters patent No. 26506, for an "improvement in water traps," granted to J. A. Lowe, bearing date December 20th, 1859.

And various other letters patent and printed publications, to which defendant craves leave to refer upon the hearing hereof or upon the taking of testimony hereunder.

And therefore this defendant does plead the matters and things aforesaid in bar of the complainant's said bill, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

HOWARD A. SPERRY,
Defendant's Solicitor and of Counsel.

Office, No. 228 Broadway, New York city, N. Y.

(Endorsed:) U. S. circuit court, so. dist. of N. Y., second circuit. John McCloskey, compl't, *vs.* R. Hamill, def't. Defendant's plea. Howard A. Sperry, solicitor for def't, 229 B'way, N. Y. U. S. circuit court. Filed Nov. 15, 1881. Joseph M. Deuel, clerk.

13 UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF NEW YORK, } *ss:*
City and County of New York, }

Robert Hamill, being duly sworn, deposes and says that he has read the foregoing plea to the bill of complaint in this suit, and that the same is true in fact and is not interposed for the purpose of delaying said suit or any proceeding therein.

R. HAMILL.

Sworn to before me this 14th day of November, 1881.

SIDNEY OSBORNE,
Notary Public and Com'r of Deeds.

I certify that, in my opinion, the foregoing plea of R. Hamill to the bill of complaint of John McCloskey, complainant, is well founded in law and proper to be filed in the above cause.

HOWARD A. SPERRY,
Of Counsel.

14 *The Replication of John McCloskey, Complainant, to the Plea of R. Hamill, Defendant.*

Circuit Court of the United States for the Southern District of New York, in the Second Circuit. In Equity.

JOHN MCCLOSKEY *against* R. HAMILL.

John McCloskey, this repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said plea, for replication thereunto, says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said plea of the said defendant is uncertain, untrue, and insufficient in — to be replied unto by said repliant, without this, that any other matter or thing whatsoever in the said plea contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things the said repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

Dated N. Y. city, Nov. 22, 1881.

JAMES A. WHITNEY,
Complainant's Solicitor, 140 *Nassau Street, N. Y. City.*

(Endorsed:) U. S. circuit court, so. dist. of New York. In equity. John McCloskey ag'st R. Hamill. Replication to plea. James A. Whitney, compl't's solicitor, 140 Nassau St., N. Y. city. U. S. circuit court. Filed Nov. 22, 1881. Joseph M. Deuel, clerk.

15 United States Circuit Court, Southern District of New York. In Equity.

JOHN MCCLOSKEY, Complainant, *against* R. HAMILL, Defendant.

SIR: Please take notice that on Tuesday, November 29, 1881, at one o'clock p. m., at my office, No. 140 Nassau street, in the city of New York, before John A. Shields, Esq., United States commissioner and a standing examiner of said court, I shall proceed to take testimony on the part of complainant under and pursuant to the sixty-seventh rule in equity of the Supreme Court of the United

States as amended. You are invited to be present and cross-examine.

New York, November 25, 1881.

JAMES A. WHITNEY,
Solicitor for Complainant.

To Howard A. Sperry, Esq., solicitor for defendant, 229 Broadway, N. Y. city.

16 United States Circuit Court, Southern District of New York.
In Equity.

JOHN MCCLOSKEY, Complainant, *against* R. HAMILL, Defendant.

Proofs for final hearing, for complainant, taken before John A. Shields, examiner, on the 29th day of November, 1881, pursuant to the 67th rule in equity as amended of the Supreme Court of the United States.

Present: James A. Whitney, Esq., counsel for complainant; Howard A. Sperry, Esq., counsel for defendant.

Counsel for complainant puts in evidence certified copy of the letters patent granted John McCloskey October 21, 1879, No. 220,767, for improvement in soft-metal traps, the same being the letters patent on which this action is brought.

Same marked in evidence "Complainant's Ex. McCloskey's Patent, Nov. 29, '81, J. A. S., Ex'r.

Defendant's counsel consents that complainant amend his
17 bill of complaint herein by setting forth the name of the defendant in full, as "Robert Hamill" in lieu of the abbreviated form, "R. Hamill."

Adjourned subject to new notice.

United States Circuit Court, Southern District of New York. } In Equity.

JOHN MCCLOSKEY, Complainant, *against* R. HAMILL, Defendant.

SIR: Please take notice that on Wednesday, December 14, 1881, at eleven o'clock a. m., at my office, No. 140 Nassau street, in the city of New York, before John A. Shields, Esq., United States commissioner and a standing examiner of said court, I shall proceed to take testimony on the part of complainant under and pursuant to the sixty-seventh rule in equity of the Supreme Court of the United States as amended. You are invited to be present and cross-examine.

New York, Dec. 12, 1881.

JAMES A. WHITNEY,
Solicitor and of Counsel for Complainant.

To Howard A. Sperry, Esq., solicitor for defendant, 229 Broadway, New York city.

18 CITY AND COUNTY OF NEW YORK, *ss:*

United States Circuit Court, Southern District of New York. In Equity.

JOHN MCCLOSKEY *against* R. HAMILL.

Thomas E. Crossman, being duly sworn, deposes and says that he is a clerk in the office of James A. Whitney, complainant's solicitor herein; that on the 12th day of December, 1881, he served a copy of the within notice upon Howard A. Sperry, defendant's solicitor herein, at his office, No. 229 Broadway, in the said city, by handing said copy to and leaving the same with a person in charge of said office in the absence of said Sperry therefrom.

THOMAS E. CROSSMAN.

Sworn to before me December 12, 1881.

JAS. H. MATTHAEI,
Notary Public, N. Y. Co., 157.

19 WEDNESDAY, *December* 14, 1881—11 a. m.

Pursuant to new notice parties attended.

Present: Counsel as before.

Adjourned, by consent, to 2 p. m. this day.

AT 2 P. M.

Present: Counsel as before.

AUGUST W. ALMQVIST, an expert witness produced on behalf of complainant and being duly sworn, deposes and says in answer to interrogatories proposed to him by JAMES A. WHITNEY, counsel for complainant, *says:*

1 Q. What is your name, age, residence, and occupation?

A. My name is August W. Almqvist; age, forty-two years; residence, 365 State street, Brooklyn, N. Y.; occupation, patent solicitor and mechanical engineer.

2 Q. Please state your experience and qualifications which, in your opinion, render you competent to testify as an expert in this action.

A. I was educated at Wenersborg College, in Sweden, and afterwards at Berä's Technical Institute, Sweden. I then went into the construction of glass furnaces and introduced improvements by which the time required for melting was reduced from seventeen hours to twelve hours. I then went to the Motala Iron
20 Works, the largest and best iron works in Sweden—that is to say, in the world—every detail of the work being there done in the same establishment, and the work ranging from the melting of the pig iron for the production of wrought iron to the building of steamships, locomotives, and other structures and machinery, and all the details thereof, including brass and iron founding. I was

there employed first in the foundry and then in the machine-shops. I then came to the United States, and, at the instance of Capt. John Ericson, was employed in building machinery for the U. S. iron-clad Dictator. I then became constructing engineer for the Passaic Iron Works, Newark, N. J. I was then employed by the U. S. Government as constructing draughtsman for the locomotive works at New Berne, North Carolina. On my return to New York I was associated with City Surveyor Smith in making surveys in the States of New York and New Jersey. I was then appointed professor of mechanical drawing and higher mathematics in Cooper Union, and at the same time took the position of superintendent of the Sterling and Kerr Iron Works, in West 24th street, New York city, and directed the construction of four of the first steam fire-engines to be drawn by horses in said city. I then accepted a position in the office of the Scientific American, N. Y. city, where I remained for thirteen years as mechanical engineer, draughtsman, and patent examiner. During this time I made drawings and specifications of several thousand inventions. During the three years last past I have been engaged in business on my own account, as mechanical engineer, draughtsman, and patent solicitor, at No. 37 Park Row, New York city.

3 Q. Please state what difference, if any, there is between cast lead as it exists in the cast trap, so called, and lead as it exists in what is termed the wrought or die-drawn plumbers' trap, such as is covered by the claim of complainant's patent herein, and detail any tests which you may have made bearing upon this subject.

21 A. There are numerous and decided differences, and some of them—as for example, the porous character of the lead in the cast trap and the dense and fibrous character of the lead in the wrought or die-drawn trap—could be readily shown by a simple test. I have made these tests with an hydraulic hand pump fitted with a gauge for indicating the pressure. The traps were all of them purchased in the open market, and were such as are now known, respectively, as cast traps and as wrought or die-drawn seamless traps. I tested first a cast trap and then a drawn trap, each of an inch and a quarter in diameter, this being one of the standard sizes. The water sweated through the cast trap before the gauge indicated anything above zero, the pressure being practically so slight as not to be taken into consideration by the manufacturers of standard pressure gauges. The water appeared upon the outside of the trap just as perspiration appears upon the forehead of a human being in hot weather, only that I have never known any one to perspire as freely as the water came through the pores of this trap under the slight pressure above indicated. The water sweated through the walls of the cast trap, as I have just mentioned, and then ran together in drops, which united and flowed away in a small stream. A trap as porous as this would permit the passage of noxious gases through the pores of its walls, under ordinary atmospheric pressure, without difficulty. I then raised the pressure in this same trap until, as indicated by the gauge, it reached toward two pounds, when a small jet was thrown out at one place in the trap through an opening which both before and after the test was imperceptible

to ordinary eye-sight. As the pressure was thus raised the water passed out through all parts of the walls of the trap in greatly increased quantity and with greatly increased rapidity. When the pressure reached ten pounds to the square inch the water flowed through the porous metal so rapidly that the pump could not supply it fast enough to raise the pressure further. When the trap was detached from the testing apparatus it presented precisely the same appearance that it did before the test commenced. The trap was apparently strong, but in reality so spongy and porous as to
22 be useless for any sanitary purpose, and actually unfit for use in plumbing work.

I then subjected the die-drawn seamless lead trap of the same size to the action of the same testing apparatus under precisely the same conditions. I raised the pressure to a hundred and twenty pounds to the square inch, which was the highest which the gauge could indicate (the pressure was actually greater than this, but this was the highest that the gauge was capable of showing), and there was no trace whatever of any water passing through the walls of the trap and no indication whatever of any sweating, the walls remaining perfectly dry on the outside. I speak positively on this head, for I wiped with my naked hand the dry dust from the outside of the trap while the pressure of one hundred and twenty pounds pressure of water to the square inch was full on. Such a trap is not porous, and is capable of absolutely resisting the passage of gases through its walls, and is a far different trap in nature and character from a trap formed by casting.

I afterwards selected a cast trap four inches in diameter, and also a wrought or drawn trap of the same dimensions, these being the same as are now sold in the shops, and being fair representatives of their respective kinds. I subjected them to the hydraulic test with the same apparatus used in the tests which I have before described. The cast trap sweated freely at a pressure of forty-five pounds to the square inch, and at one place flung out a thin jet of water through the widening of some of the pores. I then allowed the pressure to reduce down to zero, but the sweating continued from the time it first started until the test was concluded, the water passing freely through the walls of the trap until the pressure was reduced to zero. In this case, as with the other, the trap presented the same appearance after the test as it had done at the beginning, notwithstanding the passage of the water through its walls as described.

The relative weights of water, air, and hydrogen are, water 830, air 1, hydrogen $\frac{1}{15}$, nearly. The fluidity and capacity for
23 permeating of gases being inversely proportional to their weight, it follows that a trap sweating water through its walls at forty-five pounds pressure, as did the four-inch cast trap, would let air pass through the same walls at a pressure of one ounce, and hydrogen and the lighter and more dangerous sewer gases at a pressure of one-sixteenth of an ounce to the square inch. Even the heaviest of common poisonous gases, sulphurted hydrogen, would pass through under a pressure of seventeen and four-fifths ounces

to the square inch, a pressure only a trifle over that of a fall of less than two and one-half feet of water.

(The drawn trap of the same size did not sweat even under one hundred and twenty pounds pressure and burst before leaking, and its walls must be practically impervious to the passage of any gases).

I then took the four-inch drawn trap and tested it in the same apparatus under identically the same conditions. No sweating or leakage of water through the walls occurred with this trap at any stage, although I carried the pressure to one hundred and twenty pounds to the square inch. When the pressure had reached about seventy-five pounds to the square inch I noticed that the excessive pressure expanded the trap, thus increasing its diameter and proportionally diminishing the thickness of its walls at those parts. This continued until the limit of pressure indicated by the gauge, namely, one hundred and twenty pounds to the square inch, was reached, whereupon, the metal gradually growing thinner, parted, but, even with the diminished thickness caused by the stretching of the metal before parting, there was no sign whatever of any moisture passing through the metal. When it parted the opening formed a longitudinal slit in the direction of the longitudinal "striations," so called, on the surface of the trap.

The results of these tests only showed what has been well known for a quarter of a century, and probably a great deal longer to men familiar with the practical working and use of lead and similar metals and to scientists familiar with the principles of metallurgy.

24 The difference between cast lead and lead that is wrought or drawn is very great. Their properties are different; their effects or results when applied to use are in a great degree different, and for many purposes they should be considered as distinct, one from the other, as cast iron is from wrought iron or as oak is from bass-wood. The fact that cast lead is so porous renders it one of the worst materials for plumbers' traps, while the drawn lead is so dense as to be one of the best metals for that purpose. This is only one of the differences which exist between the two materials. The splitting of a trap in a direction parallel with the "striations" or slight ridges on its surface indicates the fibrous character of the drawn lead, and as cast lead has no fibrous nature this is a specific difference between the two. There can be no doubt that the alternate ridges and depressions termed "striations" on the surface of the wrought pipe co-ordinate with the longitudinal fibrous character of the wrought lead to insure that a fracture, in case it does occur, will be longitudinal, and this in practical plumbing must be a decided advantage, inasmuch as the trap, instead of being thrown away, as would commonly be necessary if the fracture were irregular, can be readily mended. With a cast trap which has neither a fibrous structure nor longitudinal ridges and depressions or "striations" the fracture would be irregular, and its direction could not be foreseen, nor could the fracture be so readily mended after it had occurred. It is well known that cast lead, from its peculiarities, will not solder nearly as readily or as easily as drawn lead.

The castings of traps in molds, which causes the molten lead to come into contact with the air as the latter is driven out of the moulds, and which in a great measure must prevent the escape of the newly formed oxide from the mass of the metal, must cause the oxide to unite with the metal to an appreciable and material extent, thereby forming a combination of oxide and metallic lead, which is manifestly a different composition from the metallic lead which is cast into ingots in such manner that the oxide forms at the top of the mass, or which is melted in the pot in such manner that
25 the oxide would form at the top of the mass. I am convinced, therefore, that the compound substance of which the cash traps are composed is, for the reason I have just stated, chemically a different substance from that of which the wrought or drawn trap is composed.

4 Q. Have you any of the traps which you tested as you have just stated? If yea, please produce them.

A. I here produce two of the traps. The one marked "A" is a cast trap and the one marked "B" is a die-drawn seamless trap.

The two traps are put in evidence and marked, respectively, Complainant's Exhibits "Cast Trap" and "Die-Drawn Seamless Trap."

And in answer to cross-interrogatories propounded by HOWARD A. SPERRY, Esq., counsel for defendant, he says:

5 Cross-Q. Do I understand you to say that in the die-drawn soft-metal trap that the walls have greater solidity, more perfect uniformity, and are more elastic than in the cast trap, and that in the process of drawing the metal is changed or improved?

A. I do not know whether you understand me or not. I did not say solidity; I said density. I say there is more perfect uniformity. I do not wish to say more elasticity, but tensile strength; and in the process of drawing I say the metal is changed and improved for this purpose.

6 Cross-Q. Are not these differences between the two traps which you have described due to the process of manufacture?

A. They are.

7 Cross-Q. And was not the effects of drawing or casting lead known for a long series of years before October 21, 1879?

A. The processes were known—that is, the processes of drawing and casting lead were known—the effects for the present purpose probably not.

26 8 Cross-Q. Are not these differences that you have described the same as those existing between cast and drawn lead pipe?

Objected to as incompetent and immaterial.

A. I have not had occasion to test the cast and drawn pipes, but the differences would naturally vary according to the manner and apparatus employed for the purpose.

9 Cross-Q. Would not these differences exist between drawn and cast lead pipe of about the length which these traps would be if they were straight and were subjected to the same test?

Same objection.

A. If these traps were straight they would then cease to be traps, and not pertinent to my test and examination.

10 Cross-Q. Are not these traps simply bent lead pipe?

Objected to as incompetent and obscure. It does not appear whether the traps are made of ordinary pipe bended into shape or of pipe made primarily in a curved form.

A. The trap marked "B" is bent by the manner of and in the process of drawing it to the die. The cast trap marked "A" has not been bent, but simply received its shape from the curviform mold as the latter became filled by the liquid poured into it in casting.

11 Cross-Q. Would not the differences you have described in your direct examination exist between two pieces of lead pipe eighteen inches long, the one cast and the other die drawn?

A. As before stated, I have not had occasion to examine the lead pipe, either drawn or cast.

Cross-examination closed.

27 And in answer to redirect interrogatories by Mr. WHITNEY he says:

12 Redirect Q. If you should take a piece of drawn lead pipe of the same diameter as the Exhibit "Die-Drawn Trap" and should bend it into the shape of that trap would not the character of the metal at the bends be changed; would it not be compressed and roughened at the inner sides of the bends, and would it not be stretched and made thinner and weaker at the outer sides of the bends?

A. It would, most certainly.

13 Redirect Q. If you should take a piece of straight drawn lead pipe of three or four inches in diameter and with walls of from one-eighth of an inch to three-sixteenths of an inch in thickness would it be possible to bend it into the usual shape and proportions of an ordinary three or four inch plumbers' trap without buckling the metal at the inner sides of the bends and breaking it open at the outer sides of the bends?

A. I think not.

14 Redirect Q. Do you know of any way by which a piece of straight ordinary drawn lead pipe can be converted into a trap like Complainant's Exhibit "Die-Drawn Seamless Trap"—that is to say, into a trap having the uniform thickness of the walls throughout, the same shortness of curve usual in plumbers' traps, and the other advantages which you have specified?

A. I do not.

A. W. ALMQVIST.

Sworn to before me this 14th day of December, 1881.

JOHN A. SHIELDS, *Examiner.*

Adjourned to Thursday, December 15, 1881, at 11.30 a. m.

28 THURSDAY, *December* 15, 1881—11 a. m.

Present: Counsel as before.

DUBOIS D. PARMELEE, an expert witness produced on behalf of complainant and being first duly sworn according to law, in answer to interrogatories proposed to him by JAMES A. WHITNEY, counsel for complainant, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. My name is Dubois D. Parmelee; of lawful age; residence, New York city; occupation, practical and analytical chemist.

2 Q. Please state your experience and qualifications in connection with applied science as bearing upon metallurgy, &c.

A. I am a doctor of medicine. During more than twenty-five years last past I have been by profession a practical and analytical chemist, and during this time have been engaged in various suits at law as a chemical expert; have had a large experience in the metallurgic arts, including the reduction of lead ores and the working of lead into pipes, sheets, retorts, and other forms. I have invented and patented several improvements in the manufacture of lead pipes. Several years ago I gave special altention to the action of water and gases upon lead pipe, and have had experience in the reduction of lead from the ores, in a professional way, with A. H. Everitt, Webster & Co. Lead Works, New York Lead Works, Colwell, Shaw & Willard's Lead Works, all of New York city, and for nearly a year at the Newport Long Island Lead Works; have experimented on lead pipes mechanically and chemically; also lead traps.

3 Q. I place before you two plumbers' traps, one a cast-lead trap, marked "Defendant's Exhibit C;" one a die-drawn seamless
29 trap of lead, which is marked "Complainant's Die-Drawn Seamless Trap." Please state what differences, if any, exist between those two traps as regards the materials of which they are composed and as regards their relative utility and character as plumbers' traps?

A. The differences between those two traps are clear and distinct. I should say the differences between those two kinds or classes of traps are clear and distinct. I base this opinion upon the recognized differences which exist between cast lead as such and lead that has had its character changed and modified by pressure and drawing as it is driven through a die. The physical character of the lead is changed by the operation of die-drawing; it also changes its susceptibility to the action of chemical agents. When metallic lead is formed into castings it has a certain nature which is entirely changed when the lead is subjected to compression and drawing, as, for example, by being forced through a die, as described in the McCloskey patent No. 220,767, October 21, 1879. This changing of the nature of the original lead gives it new properties or characteristics which for many purposes make the lead practically an improved and structurally different material, having advantages which do not

exist in the original lead. The change effected in lead by subjecting the cast lead to compression and drawing is as follows:

The cast lead is made up of crystals, which will be finer or coarser according to various circumstances attending the melting and cooling of the lead. When we compress the metal behind a die so that the metal is forced through the die in a strip or tube, as the case may be, these crystals are first forced more closely together, which compresses the metal and gives it a greater density and makes it less porous, whereupon, the metal being forced through the die, the crystalline form gives way and the material is converted into a fibrous condition, as it is termed by metallurgists. This gives the metal much greater strength and density.

This property of being changed from the crystalline form
30 of cast metal to the fibrous form of wrought metal is inherent in all metals, and the only difference is that some metals are so refractory that special means have to be adopted in order to soften the crystals before they can be drawn out; for instance, cast copper, like cast lead, is a crystalline substance, but being very hard it requires to be heated before being compressed and drawn to bring it into its wrought condition; but lead affords, perhaps, the best example of the change, inasmuch as the crystals of lead are so soft that they may be readily converted by the pressure and drawing into the fibrous form to which I have referred, and which changes the character of the metal so as to make it for many purposes a material of a different character. Lead, owing to its softness, may be compressed and drawn without heating; yet even with this the use of heat is advantageous to soften the crystals of the cast lead on the same principle that heat is advantageous to soften the crystals of the cast copper, and, in fact, of all metals hard enough to be manipulated.

In McCloskey's patent aforesaid the treatment of the lead insures its softening by heat while being drawn through the die. McCloskey starts by heating his lead, then cooling it before it issues from the die, which has the result of bringing the lead to the same crystalline from which it has in mass, immediately upon which the newly crystallized lead is forced through the die, being there subjected to compression and drawing, so that the crystals are destroyed and the metal is transformed into the fibrous or wrought condition of which I have spoken.

The manufacture of wrought iron, although involving some additional or intermediate operations, is based upon precisely the same principle of destroying the crystalline structure of the cast metal by subjecting it to the action of pressure and drawing.

In the primitive methods of making wrought iron from rich specular ores, as practiced in the infancy of the art, the ores were heated with charcoal, which abstracted the oxygen from the ores (the ores being rich oxide of iron) and left the metal in the form of a conglomeration of minute crystals, the metals being kept at
31 a heat for the time sufficient to soften these crystals, so that they would more readily unite when subjected to hammering, which not only condensed but drew the metal out into bars or other desired forms. This is the principle upon which iron was first

manufactured, and is substantially the operation by which it could now be manufactured were it not that it is necessary, in order to obtain a sufficient quantity for the wants of commerce, to employ a blast furnace, which, owing to certain defects necessarily incident to its operation, renders an intermediate process necessary in the conversion of the crystalline cast metal into the state of wrought metal. This defect, as I term it, is simply this, that the molten metal in descending in the blast furnace is kept so long in contact with carbonaceous gases that it absorbs a large quantity of carbon, so that the castings, instead of containing merely the original iron derived from the ore, also contain the carbon artificially introduced while the iron is being reduced from the ore. It is, therefore, necessary to remove this carbon before the iron can be brought into a wrought condition, and it is for this purpose that the operations of refining and puddling are introduced before the metal is subjected to the compressing and drawing operation by which its crystalline structure is permantly transformed into its fibrous structure.

I mention these facts concerning iron to illustrate the great truth in metalliurgy that the transformation of any cast metal into a wrought condition depends upon substantially the same principle as the transformation of any other cast metal into a wrought condition, the differences in the treatment of different metals for this purpose being merely differences in manipulation, according as the crystals of one metal are harder or softer than those of another, and thereby require a greater or less degree of heat to soften the crystals in order that compression and drawing may destroy them and convert the material into a fibrous non-crystalline and wrought metal. Wrought lead is denser than cast lead, just as wrought iron is denser than cast iron. Wrought lead is much less porous, and
32 consequently much less liable to permit the passage of gas through it than is the case with cast lead, and the same rule applies with regard to cast iron as compared with wrought iron, as regards cast brass as compared with wrought brass, and as regards cast as compared with wrought copper.

The porosity of cast lead as compared with wrought lead is not a matter of deduction only; it is an incontrovertible fact. I have had occasion in my business and professional capacity to have made a large number of lead retorts for use in the manufacture of chlorine gas, and also for the manufacture of hydro-fluoric acid. It was found that these retorts could not be made of cast lead so as to answer the purposes required, as I have just stated. They were so porous that the gas escaped through their walls, so that they were practically useless; furthermore, they corroded with extreme rapidity Cast lead was useless for the purpose and had to be given up. We then made our retorts of wrought lead in sheets, the edges antogeneously soldered, and these wrought answered perfectly, and such wrought lead retorts are now general. This distinction between cast lead and wrought lead is well understood by experienced chemists. It is well known that lead pipes were formerly made of cast lead and were subject to all the defects of cast lead to which I have referred. The porosity of cast pipe or cast lead generally for such

purposes, even where not manifest at first, is operated upon by the gases penetrating the pores and setting up chemical action, which corrodes the material and permits the passage of gases which are offensive and unhealthy. Wrought-lead pipe is more manageable than cast-lead pipe, owing to the absence of crystalline structure. When wrought lead pipe bursts from internal pressure the rupture is lengthwise. Wrought lead pipe cuts easier lengthwise than crosswise, thus indicating the fibrous structure. Rolled sheet lead is stronger lengthwise than crosswise, thus illustrating the same principle. Wrought lead differs from cast lead in some respects even more than wrought iron differs from cast iron or
33 wrought copper from cast copper. For instance, the oxide of iron and copper do not enter mechanically or chemically into the composition of cast iron or cast copper, but it is well known that the oxide, which always forms on the surface of melted lead when brought in contact with the air, enters into the structure of the lead itself, and tends to make it hard and brittle; and, inasmuch as this oxide forms upon the surface of the molten lead whenever the latter is brought in contact with the air, it follows that this oxide will be formed within the mold when lead is cast, inasmuch as it is not possible, in the practical operations of casting lead, to exclude air from the mold, except as the air is pushed out by the contact of the melted lead therewith when the lead is poured in. Furthermore, the common impurities which exist in commercial lead affect its character as a casting much more than common impurities in copper or iron affect the character of cast copper or cast iron, the presence of antimony in lead especially tending to make it very hard and brittle.

The only use of plumbers' traps is to convey foul liquids away from dwellings and other buildings and to prevent the gases from the sewers escaping into the dwellings or buildings. Cast-lead traps, being porous in their character as compared with traps made of compressed and drawn lead, are readily attacked by corrosive liquids which come in contact with the inner surfaces of the traps, and are also, because of their porosity, far more likely to permit the escape of gas through their porous walls than is the case with the wrought-lead traps.

There is also, in another respect, a greater difference between cast lead and wrought lead than between cast iron and wrought iron, and this arises from the presence of gases in the molten metal. With cast iron the metal, being necessarily at a very high heat, takes so much time to cool that the bubbles, with a properly constructed mold, have time to escape, whereas lead melting at a low temperature cools so quickly that the gases are more or less confined within the metal, and form "blow holes," as they are termed, which
34 very frequently cannot be detected from the surface, and constitute concealed flaws in the trap, liable to cause the trap to give way at any time, either from a slight corrosion in the walls or from internal pressure. In lead wrought by compression and drawing such holes cannot occur.

4 Q. You have stated in your foregoing answer that the susceptibility of lead to the action of chemical agents is changed by the ac-

tion of die drawing; do you mean to be understood as saying that there is a difference between cast lead and wrought lead in that respect?

A. Yes.

5 Q. Do you state this as an absolute fact?

A. Yes. I will give an example from my own experience. In 1858 Mr. Wells, the old and well-known type founder, invested a considerable sum of money in a new process for the manufacture of carbonate of lead or white lead, as it is commonly known, and established a factory at Hoboken, New Jersey, for the manufactory. There were some difficulties in the processes, and I was employed to go over there and see if I could assist them in overcoming them. The process consisted in melting the lead in a large iron kettle and allowing it to flow in a small stream on cold revolving polished iron cylinders, which formed the lead into very thin sheets resembling carpenters' shavings. These shavings were placed on screens and put into closed chambers charged with vapors of acetic acid to form acetate of lead, and afterwards to admit carbonic acid to convert the acetate into the carbonate of lead. The question arose as to whether it would not be cheaper to roll the metal into thin sheets or foil directly, and then to proceed afterwards as above designated. The experiment was tried, and it was found that the action of the acetic acid on the rolled or wrought lead went on so much more slowly that it was not economical to practice it. This experiment I personally took part in conducting. My recollection is that the action of the chemicals on the cast lead was about twenty per cent. more rapid than upon the wrought lead. The crystalline character of cast lead is shown by many authorities, as, for example, Dr. Ure's Dictionary of Arts, Manufactures, and Mines says that fused lead "is crystallizable on cooling into octahedrant implanted with each other so as to form an assemblage of four-sided pyramids." I have quoted *verbatim* from page 30 of vol. 2.

6 Q. Where was the work published and what edition do you refer to?

A. It is the same in all the editions. It was published in this country by D. Appleton & Co., New York city. I gave the page and volume of the edition of 1856.

7 Q. Please state what differences, if any, exist between a piece of ordinary drawn lead pipe and a die-drawn seamless trap of lead.

A. The difference is that ordinary drawn lead pipe is substantially straight and so intended to be for use, and I am convinced from my own actual trials that it cannot be converted into a plumbers' trap. It is equally clear to me that the die-drawn seamless trap cannot be converted into a piece of straight lead pipe that would be good for anything as a pipe. The die-drawn seamless trap of soft metal combines the shape or configuration of the old plumbers' trap with the physical or structural character of wrought or drawn lead pipe, and this provides a different trap from any of the traps previously known, and a tubular device which is different from the straight or ordinary drawn lead pipe.

8 Q. You say that you are convinced from your own actual trials

that ordinary or straight lead pipe cannot be converted into a plumbers' trap; what were those trials?

A. The trials were made by filling and packing straight lead-pipe tubes with fine sand. The sand was packed inside and both ends soldered, caps soldered on the ends to confine the sand, and then attempting to bend it over wood forms by gradual bending and hammering with wooden mauls. Other experiments were made by filling the straight pipes with water and hermetically sealing the ends and proceeding as in the case of the sand. I found that the
36 pipe would buckle on the inner side of the bend and break on the outer side. The radius of the inner side of the bend that we attempted to make in these experiments was about three-quarters of an inch. The calibre of the pipe which we experimented on was about one inch, and three-sixteenths of an inch was about the thickness of the wall. In conducting these experiments I had the assistance of practical plumbers—men who were used to working lead pipe.

9 Q. You say the radius of the inner sides of the bends which you attempted to make were about three-quarters of an inch at the inner sides. These bends were not nearly as short as those "Complainant's Exhibit Die-Drawn Seamless Trap," were they?

A. No; they were not. That exhibit has bends at least one-half shorter than those I attempted to make with the lead pipe. The radius of the inner sides of the bends of that exhibit is not more than three-eights instead of three-fourths of an inch.

Adjourned to Friday, December 16, 1881, at 2.30 p. m.

FRIDAY, *December* 16, 1881—2.30 p. m.

Present: Counsel as before.

The witness, DUBOIS D. PARMELEE, produced for cross-examination, and in answer to cross-interrogatories by HOWARD A. SPERRY, Esq., counsel for defendant, deposes and says:

10 Cross-Q. Doctor, you say in the latter part of your answer to the 7th direct interrogatory that the die-drawn seamless trap
37 is a tubular device, which is different from the straight or ordinary drawn lead pipe; will you be kind enough to explain what you mean by that last sentence, "A tubular device which is different from the straight or ordinary drawn lead pipe," aside from its shape?

Objected to as immaterial and as directly answered by the direct examination of the witness.

A. I mean that while its physical structure being devoid of crystalline structure and being formed by the same mechanical operation it is different in form from the straight pipe evidently, and this difference in form is such that it cannot be produced from straight pipe.

11 Cross-Q. Do you wish to be understood, then, as saying that

the physical and structural character of the die-drawn seamless trap is the same as the ordinary wrought or drawn lead pipe?

A. That is my judgment, having in view the principle of its construction. I have not submitted it to a test myself as a trap that I have submitted lead-drawn pipe to. My opinion is formed, as above stated, from the principle by which it is made.

12 Cross-Q. You have described certain differences between "Defendant's Exhibit C" and Complainant's Exhibit "Die-Drawn Seamless Trap," in your direct examination. Are not those differences simply due to the process of manufacture?

Objected to as incompetent and irrelevant. The patent covers an entity shown to be different from any other previously in use for that purpose.

A. The article itself is different. I regard the process as immaterial. No process that I know of could make one of those traps out of a piece of straight lead pipe. The atomic structure of straight-drawn lead pipe and "Complainant's Exhibit Die-Drawn Trap" I regard as substantially the same. I also regard the atomic structure
38 of a piece of straight cast lead pipe and the cast trap "Defendant's Exhibit C" as substantially identical. The atomic structure of the cast pipe and the drawn pipe I regard as very different.

13 Cross-Q. Do you wish to be understood as saying that the walls of the die-drawn seamless trap have greater solidity than the cast trap?

A. Certainly.

14 Cross-Q. And is the die-drawn trap more perfectly uniform in its walls than the cast trap?

A. I don't know. In order to determine that it would require to cut the trap in two and measure it with calipers, which I have done.

15 Cross-Q. Are the walls of the die-drawn trap more elastic than those of the cast trap?

A. There is no elasticity to either of them. The die-drawn trap has more tensile strength.

16 Cross-Q. Do you wish to be understood as saying that the quality of the metal is changed and improved by the operation of drawing?

A. Yes; I do. It is made more dense; by artisans it is termed more fibrous. It possesses more tensile strength. Its specific gravity is greater, and it is not acted upon as rapidly by those acids and gases which act upon cast lead as cast lead is acted upon—an example of experiments of which I have detailed in my direct examination.

Cross-examination closed.

DUBOIS D. PARMELEE.

Sworn to before me this 16th day of December, 1881.

JOHN A. SHIELDS, *Examiner.*

Complainant's counsel gives notice that at the hearing herein he will call the attention of the court to extracts from the books
39 of publications hereinafter named. Said books or publications can, most of them, be seen in the library of the American Institute, at the Cooper Union building, New York city. The others at the book store of D. Van Nostrand, No. 23 Murray street, in said city.

The article "Lead," in The Edinburgh Cyclopedia, American reprint of 1832.

Roscoe & Schorlemmer's Treatise on Chemistry.

Gregory's Cyclopædia of Arts and Sciences—article, "Lead."

Naquet's Principles of Chemistry.

Brand & Taylor's Chemistry.

Lincoln's Dictionary of Chemistry.

The Encyclopædia of Chemistry.

Percy's Metallurgy of Lead.

Crook's & Rohrig's Practical Treatise on Metallurgy.

Appleton's American Cyclopædia—article, "Lead."

Tomlinson's Cyclopedia.

Well's Principles and Applications of Chemistry.

Encyclopædia Britannica, 8th edition.

Clark's Manual of Rules, Tables, and Data for Mechanical Engineers.

Spon's Dictionary of Engineering.

Adjourned to Saturday, December 17th, 1881, at 11 a. m.

40 SATURDAY, *December* 17, 1881—11 a. m.

Pursuant to adjournment.

Present: Counsel as before.

ALFRED IVERS, an expert witness produced on behalf of complainant, being duly sworn, and examined by JAMES A. WHITNEY, Esq., counsel for complainant, says:

1 Q. What is your name, age, residence, and occupation?

A. My name is Alfred Ivers; age, sixty-six years; residence, No. 316 Fourth avenue, New York city; occupation, plumber.

2 Q. Please state your experience as a practical plumber and as a workman familiar with the properties of metals.

A. I am a master plumber; have served a regular apprenticeship at the trade of plumber, and have followed the business for 35 years. I am treasurer of the Association of Master Plumbers of the city and county of New York. The association is composed of about 300 master plumbers—boss plumbers, as they are sometimes called.

3 Q. Please state the differences, if any, between a cast lead on the one hand and drawn or wrought lead on the other; also the differences, if any, between a cast-lead seamless trap and a die-drawn seamless lead trap.

A. There is a great and recognized difference between cast lead and lead that has been drawn or pressed—that is to say, between lead castings and articles made of lead that has been worked by drawing it

through a die, or by compressing and drawing it out between rollers. In the first place, cast lead is very brittle and cannot be bent for practical purposes without danger of fracture. Thirty years ago I had considerable work aboard ship in making and ap-
41 plying lead hawser pipes for hempen cables. After these pipes were put up in the holes made to receive them their ends had to be flanged or turned over to keep them in place. With cast lead this was extremely difficult to do, because the lead would crack where it was bent, and the partly formed flange would often split off before the work was finished. It was the same whenever the cast hawser pipes had to be removed for any purpose. In starting them with a hammer I have seen the flanges drop off bodily from the pipe. The thickness of the walls of these castings was from half an inch on the upper side to an inch at the bottom where the hawser rubbed in passing through. Sometimes they were not more than two feet long, but in some cases—for instance, on the Russian steamer "Kamschatka"—they were about six feet long. I put in those pipes on many other vessels also. The difficulty was a serious one, but we had to put up with it because the pipes could not be made of sheet lead, as they had to be thicker at the bottom than at top. After chain cables came in the hawser pipes were made of an iron pipe surrounded by a lead pipe; this enabled us to use sheet lead from an eighth to a quarter of an inch thick and coiled to form the walls to hold the iron pipe within. There was no difficulty in flanging the wrought or sheet lead. In those days the scuppers of ships were made of cast lead, and there was always the same trouble in turning flanges—the lead cracked where it was bent; they finally gave way entirely to rolled or worked lead, which is much more pliable and free from the brittleness of the cast lead. The difference between cast-lead tubes and drawn-lead tubes is as well understood by plumbers as between cast-iron pipes and wrought-iron pipes. Lead water pipe was formerly cast, but has been abandoned this many years. In my earlier years I often helped take up cast-lead pipes that had been laid down for the Manhattan Water Works in this city. I have often taken up this cast-lead pipe and found it in such condition that by taking a piece two or three feet long and bringing the ends toward each other it would break in two like a rotten stick. Sometimes it would crack in a dozen places
42 while bending. It was always melted up as waste scrap, and was replaced in the water works by the drawn-lead pipe.

Cast-lead tubes are porous, as all cast lead is. In making a cast trap there is only the natural pressure of the liquid lead, in practice about fifteen pounds to the square inch. In the so-called die-drawn seamless soft-metal trap the heated lead is subjected to a pressure of many hundred pounds to the square inch. I am convinced from my own experience that the cast trap is so porous as to permit injurious gases to filter through the walls, and in my opinion the loose texture of the cast lead permits it to rot, for the reason that the air and gases soak, so to speak, through its substance. In the use of plumbers' traps it is frequently necessary to flange their ends. A cast-lead trap is liable to break in flanging, and even if the flange

is made the bend will be weak; a die-drawn lead trap will flange without any danger of breaking. Cast lead is difficult to clean preparatory to soldering, because the lead being porous and with an irregular surface, the scraper digs into the metal in spots, while with the drawn lead the surface is easily cleaned. A cast-lead trap, if it freezes up, will split in almost any direction, and the fracture is irregular and difficult, frequently impossible, to mend. A die-drawn trap under the same conditions will always split lengthwise, like a drawn-lead pipe, and the rupture, even if it happen at the bend, can be easily repaired. These differences result from differences in the material of which they are made. Cast lead is not the same thing as lead that has been drawn through a die; each has properties of its own that distinguish it from the other. In plumbing on shipboard we found that in putting strips around cat-head, windlass bits, etc., that it took four times as long with cast sheet lead as it did to use rolled sheet lead, and wherever a sharp corner was to be turned the cast would crack unless the greatest care was used, and even then it would frequently fracture in spite of us.

I have made water tanks for vessels of cast sheet lead, and
43 also of rolled sheet lead. The tanks made of the cast lead did not last more than one-quarter of the time that the rolled lead tanks lasted.

The great value of the die-drawn seamless trap of lead is that it unites the shape which is necessary to the plumber's trap with those properties of wrought lead which had previously been known in straight lead pipe. These properties of shape and of the character of wrought lead were never included together in one device until the die-drawn seamless trap of soft metal was contrived. It is this conjunction of qualities, which have always been separate from each other and never brought together in one device, that makes the die-drawn seamless trap a most valuable article in the trade. I can explain these differences further:

Cast-lead pipe has neither the structural properties of drawn or wrought lead nor the curves or bends essential to constitute a trap.

Drawn-lead pipe has the structural properties of drawn or wrought lead, but not the curves or bends essential to constitute a trap.

Cast seamless traps have the curves or bends essential to constitute a trap, but not the structural properties of drawn or wrought lead necessary to a perfect trap.

Die-drawn seamless traps, however, combine both the structural properties of drawn or wrought lead (like drawn-lead pipe) and the curves or bends (like the cast trap) essential to constitute a perfect trap. Before the die-drawn trap the properties of a trap and the properties of drawn-lead pipe had never been provided in one and the same thing.

4 Q. Is it possible to bend a piece of lead pipe, commonly so termed, into the shape and proportions of a serviceable and merchantable plumber's trap?

A. It is not; it is not possible.

5 Q. How do you know?

A. I have tested it. I have here a piece of common drawn-lead

pipe which I have tried to bend into a curve corresponding to a curve in a plumber's trap of similar internal bore. I filled it with sand, which is the best way of bending pipe, and then at-
44 tempted to bend the piece, and you see the result. It buckled at the inside of the bend and burst open at the outside. If it had not buckled as it did at the inside it would have burst open sooner at the outside. The larger the pipe the more it would buckle and burst.

The piece of pipe referred to by the witness in the foregoing answer put in evidence, marked "Complainant's Exhibit Bent Lead Pipe, December 17, 1881, J. A. S., Ex."

6 Q. What is the usual inside diameter—that is to say, the bore of plumbers' traps?

A. They are commonly inch and a quarter, inch and a half, two inches, three inches, four inches, and four inches and a half.

And, in answer to cross-interrogatories proposed by HOWARD A. SPERRY, Esq., counsel for defendant, he says:

7 Cross-Q. Do I understand you to say that the walls of the die-drawn seamless trap have greater solidity than the cast trap?

A. Yes, sir.

8 Cross-Q. Are the walls of the die-drawn seamless trap more perfectly uniform than those of the cast trap?

A. Yes, sir.

9 Cross-Q. Are the walls of that trap more elastic than the cast trap?

A. You can bend a die-drawn trap so (the witness moves his hands to and from each other) easier than you can bend a cast trap. That is my answer to the question.

10 Cross-Q. Is the quality of the metal changed and improved by the process of drawing?

Objected to as incompetent, it not appearing that the witness is practically conversant with the operation of drawing lead pipe.

45 A. I don't think its quality is improved, although it may be to some extent. As a trap, it is improved. It is changed into drawn or wrought metal, and has all the new properties that I have described in my direct examination.

11 Cross-Q. Do not these same differences that you have described exist between cast-lead pipe and drawn-lead pipe?

A. Yes.

Cross-examination closed.

ALFRED IVERS.

Sworn to before me this 17th day of December, 1881.

JOHN A. SHIELDS, *Examiner.*

Complainant's counsel puts in evidence certified copy decision of the examiners-in-chief in the matter of the application of John Mc-

Closkey, filed December 12, 1877, for improvement in the manufacture of soft-metal traps.

The same marked for identification Complainant's Exhibit Decision Board of Examiners-in-Chief in the Matter of McCloskey's Application, December 17, '81, J. A. S., Ex'r.

It is hereby stipulated by and between counsel in the above-entitled cause that the hearing and determination upon defendant's plea herein shall be submitted with printed briefs and without oral argument to his honor Samuel Blatchford, circuit judge, upon the pleadings herein and the testimony taken before and including this date,

46 the taking of testimony upon said plea being now closed, and that forthwith upon the filing of said testimony and said briefs counsel shall exchange not less than two copies each of their respective briefs and of the testimony taken in behalf of their respective parties; that the testimony herein and the printed briefs of counsel upon both sides shall be filed on or before the twentieth day of January, A. D. 1882; that in case counsel upon either side desires to file an additional brief he shall notify opposing counsel to that effect within four days after the receipt by him of the brief from opposing counsel, and shall have ten days thereafter in which to file said additional brief, and forthwith upon filing said additional brief he shall supply to the opposing counsel two copies of said additional brief.

HOWARD A. SPERRY,
Solicitor and of Counsel for Defendant.
JAMES A. WHITNEY,
Solicitor and of Counsel for Complainant.

The foregoing stipulation having been signed by solicitors and of counsel for both parties, the taking of testimony upon or in connection with defendant's plea herein is hereby closed.

47 COMPLAINANT'S EXHIBIT MCCLOSKEY'S PATENT. Nov. 29, '81. J. A. S., Ex'r.

(2–175.)

DEPARTMENT OF THE INTERIOR.

(Cut.)

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted John McCloskey October 21, 1879, No. 220,767, for improvement in soft-metal traps.

In testimony whereof I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this seventeenth day of November, in the year of our Lord one thousand

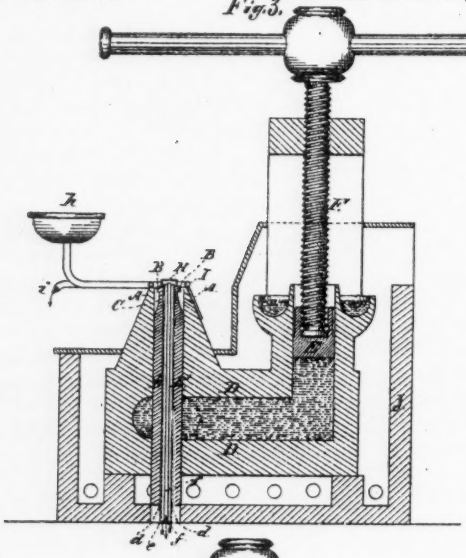
2 Sheets—Sheet 2.

J. McCLOSKEY.

Soft Metal Traps.

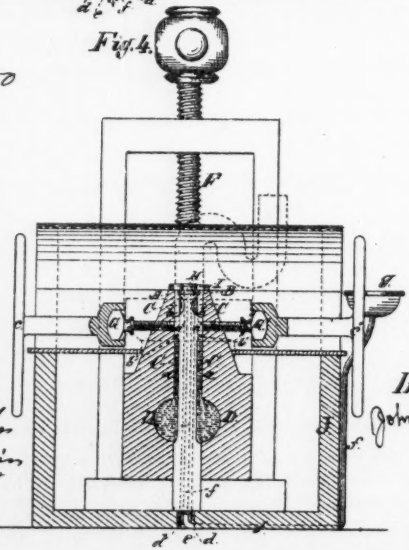
No. 220,767. Patented Oct. 21, 1879.

Fig. 3.



No. 145. Fowler v. Hamill. 1 p. 50

Fig. 4.



Witnesses:
S. H. Miller
T. P. Hopkins

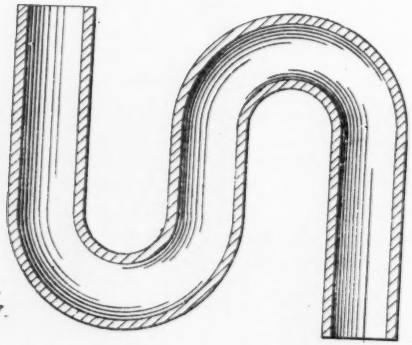
Inventor:
John McCloskey

2 Sheets—Sheet 1.

J. McCLOSKEY.
Soft Metal Traps.

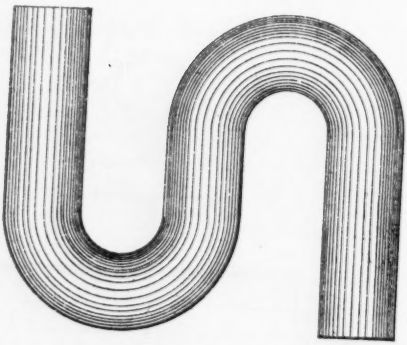
No. 220,767. Patented Oct. 21, 1879.

Fig. 1.



No. 145. Fowler & Hamill } p. 49.

Fig. 2.



Witnesses.
Henry F. Parker.
H. Wells Jr.

Inventor.
John McCloskey

eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

E. M. MARBLE,
Commissioner.

(2–155.)

(No. 220,767.)

THE UNITED STATES OF AMERICA.

(Cut.)

To all to whom these presents shall come:

Whereas John McCloskey, of New York, New York, has
48 presented to the Commissioner of Patents a petition praying for the grant- of letters patent for an alleged new and useful improvement in soft-metal traps, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and

Whereas upon due examination made the said claimant is adjudged to be justly entitled to a patent under the law:

Now, therefore, these letters patent are to grant unto the said John McCloskey, his heirs or assigns, for the term of seventeen years from the twenty-first day of October, one thousand eight hundred and seventy-nine, the exclusive right to make, use, and vend the said invention throughout the United States and the territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this twenty-first day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and fourth.

[SEAL.]

C. SCHURZ,
Secretary of the Interior.

Countersigned:

H. E. PAINE,
Commissioner of Patents.

(Here follow diagrams marked pp. 49 & 50.)

51 UNITED STATES PATENT OFFICE.

JOHN MCCLOSKEY, of New York, N. Y.

Improvement in Soft-Metal Traps.

Specification forming part of Letters Patent No. 220,767, dated October 21, 1879; application filed December 12, 1877.

To all whom it may concern:

Be it known that I, John McCloskey, of the city, county, and State of New York, have invented an improvement in soft-metal traps, of which the following is a specification.

The object of this invention is to provide what are commonly termed "plumbers' traps" (which are ordinarily made of lead) of a quality superior to those made before the date of my invention, and at much less expense.

The said invention comprises, as a new article of manufacture, a die-drawn seamless soft-metal trap, the same being the trap resulting from the practice of the means and methods herein specified as embraced in my invention—the practice of the process of causing soft metal to issue with variable velocities or in variable quantities at opposite sides of an annular die.

Figure 1 is a longitudinal sectional view, and Fig. 2 is a side view, of my said invention. Figs. 3 and 4, on a smaller scale, are vertical sectional views, in planes at right angles to each other, of an apparatus that may be used for the production of the article comprised in my said invention.

My said invention may be manufactured by any suitable process, means, or apparatus whereby soft metal may be caused to pass in variable quantities or at variable velocities through or from an annular die; but as one means of producing the article constituting my said invention I show the apparatus represented in Figs. 3 and 4, premising that for the purposes of this specification I do not claim the herein-described process or apparatus for making my said article or invention, inasmuch as said process and apparatus are set forth and claimed in my separate application for letters patent, division B, now pending.

In the manufacture of my herein-claimed invention, by means of the aforesaid apparatus, the lead or soft metal in a molten state is placed in a receiver, D, with which is connected a plunger, E, that may be actuated by a screw, F. The opposite end of said receiver communicates by a chamber, C, with an annular die, A B, which is composed of the outer end of the core B (which core is fixed centrally in the chamber C) and a surrounding outer wall, A. The chamber C, between the receiver D and the annular die A B, is divided into two parts or passages by means of lateral partitions B′, which extend in opposite directions from the core to the surrounding walls of the chamber C, but which are diminished at their upper parts to permit the soft metal to pass entirely around the core before quite reaching the die, in order that said metal may unite around the core and occupy the whole area of the die in passing through the same. The lower parts, *a*, of the chamber C are separated from the upper parts, *b*, of the same by short oppositely-arranged partitions *a′*, which are part of the partitions B′; and in each of these short partitions *a′* is a port, *b′*, said ports being adapted to be closed to a greater or less degree by valves G, which may be actuated by levers *c c′*, separately or in unison, or said valves may be operated by other appropriate means.

The core is made hollow, and is calculated to be kept at a temperature below the melting-point of the lead or soft metal by cold water circulated through it by means of the inflow and outflow pipes *e f*. In like manner the outer wall, A, of the die is kept cool by a hollow cap, H, placed on said wall, water being caused to flow

through said cap by means of suitable inlet and outlet pipes. The object of thus cooling the die is to insure the solidification of the hot lead at or just previous to its issue in tubular form from the die.

In the operation of the apparatus to make the trap the pressure of the plunger E forces the heated metal through the receiver D toward the annular die A B, the heated metal passing through the parts *a a* of the chamber C, and then through the passage *b' b'* in greater or less volume, through one passage or the other, according as one or the other of the valves G is operated to regulate the relative flow of the metal to and through said passages, and consequently upon one side or the other of the partition B', and, as a still further consequence, in greater volume or with greater velocity at one or the other of the opposite sides of the annular die A B, the pipe being, of course, turned or curved in a direction away from that side of the die A B from which the greatest portion of the metal issues—or, in other words, that side at which the metal issues with the
52 greatest rapidity or greatest volume—so that by manipulating the valves G G' to admit a greater quantity of the metal first upon one side of the partition B' and then upon the other opposite side of the said partition, the soft metal issuing in tubular form through the annular die A B is caused to assume the shape of an **S**-trap, the two streams uniting in the upper part, *b*, of the chamber C below the mouth of the die. The walls of the trap or curved tube thus formed will be of uniform thickness at the inner and outer sides of the bends or curves.

The degree of curvature is, of course, proportioned to the relative rapidity of the two streams passing from the receiver D to the two opposite parts of the chamber C above the passages *b' b'*, and thence to the annular die A B, where it issues in the form of a pipe of greater or less curvature and with solid or seamless walls, the outer surfaces of which are more — less marked with longitudinal striations from end to end of the trap, which latter is thus distinguished from other traps by its peculiar appearance.

Heat is applied by any suitable means to the soft-metal receiver D, to maintain the same at the temperature most advantageous in the practice of the invention.

J represents the furnace, of brick or other suitable material, built around the machine, to hold the burning fuel, if such be used, for heating the receiver and adjacent parts.

What I claim as my invention is—

A die-drawn seamless trap of soft metal, as a new article of manufacture, substantially as herein described.

JOHN McCLOSKEY.

Witnesses:
W. L. BROWNELL.
E. H. BROWNELL.

53 For Identificaton Complainant's Exhibit "Decision Board of Examiners-in-Chief in the Matter of McCloskey's Application." December 17, '81. J. A. S., Ex'r.

(2–175.)

Department of the Interior.

(Cut.)

United States Patent Office.

To all persons whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the decision of the examiners-in-chief in the matter of the application of John McCloskey, filed December 12th, 1877, for imp't in the manufacture of soft-metal traps.

In testimony whereof I, V. D. Stockbridge, acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this sixth day of May, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and fifth.

V. D. STOCKBRIDGE,
Acting Commissioner.

No. 5502.

U. S. Patent Office, *Aug.* 16, 1879.

Before the examiners-in-chief on appeal.

Application of John McCloskey for a patent for an improvement in the manufacture of soft-metal traps, filed Dec. 12th, 1877.

54 The claim in controversy is:

"A die-drawn seamless trap of soft metal, as a new article of manufacture, substantially as herein described."

The only question before us is as to the patentability of a die-drawn trap for plumbers' use, as a new article of manufacture. The specific machinery for producing it is not in issue.

The reasons alleged for rejecting the claim are that the examiner is constrained by a dictum in a decision made by the then Commissioner of Patents in 1877, on a motion made in a case not regularly appealed on its merits, and to which the present applicant was not directly or indirectly a party. Such a reason for rejecting the present case could only be used by the examiner on the ground of binding precedent, as there is no nearer connection between the two cases.

As a precedent, the dictum should first be examined. Does it go so far as to deny patentability to all articles of manufacture as such?

The records of the Patent Office and of the courts are filled with

valid and valuable patents on novel "manufactures" as such, this being one of the four statutory categories of invention, and the series of Commissioners' recorded decisions, from Judge Mason down, contain numerous criteria for determining the patentability of this large class of inventive contributions.

The United States courts also, aside from the many valuable claims for "manufactures" sustained in litigation, distinctly announced in Goodyear *v.* Providence Rubber Co., 2 Fisher, 510, and in Badische Analin and Soda Fabrik *v.* Hamilton M'f'g Co., 13 O. G., 273, the patentability of new articles as new manufactures. There is, then, no doubt of the patentability of new "articles of manufacture," provided they come within the legal canons.

What are the legal canons? Commissioner Leggett attempted to lay them down in such decisions as that of Chas. A. Moore, Sept. 23d, 1871, Hopson and Brooks, May 31st, 1871, etc.

55 It would seem that the article must be of course novel and useful and distinguishable in the market from other articles of its class either by appearance or superior inherent qualities readily recognizable in the trade or in use and not solely by some peculiarity in the mode of manufacture which left no trace of difference or excellence in the thing itself.

It being, then, settled that "new manufactures" as such are patentable, the Commissioner's alleged dictum could not have been intended to have so broad a scope and must have been directed, if at all, at this particular manufacture. If so there must have been some special reason for the non-patentability of this particular article not brought out in the record. Let us examine, therefore, closely just what the Commissioner said.

The whole dictum is comprised in the following sentence, taken from the decision on motion for dissolution in case of Wicks, Stephenson, *et al.*, in interference, rendered May 16th, 1877, viz:

"I am not satisfied as to the patentability of the article described in the claim of Wicks. There is nothing in the claim which would distinguish it from a cast pipe or from one made up in sections joined together, except the words 'showing a straited external surface;' but I need not discuss this matter, as there is another and clearer element in the problem."

It is thus made plain that the whole difficulty was but a mere doubt or query which the Commissioner "need not discuss," as other and special reasons weighed.

Had he found it necessary to discuss the subject or look into it at all his difficulties would have been cleared up. No one at all conversant with the state of the art and familiar with this new trap or who had had any plumbing experience with it, or even examined it in a plumbers' shop in comparison with the old forms, if gifted at all with mechanical perception, could fail of apprehending its distinctive character as well as its immense superiority over all the old forms and styles, which are so obvious as to have practically driven

56 them from the market. This is not due merely to cheapness, though that alone distances competition, but on account of inherent excellence, owing to a scientific mode of manufacture,

by which the many defects and disadvantages of the old styles were entirely removed.

Its discovery was somewhat on a par with that of the modern mode of making lead pipe itself, by which the article was revolutionized both in cheapness and quality. To one who contemplates the wonderfully laborious method of the ancient Romans, as exhibited in the ruins of their luxurious baths, showing pipes made from cast and hammered ingots lapped into U form and soldered on the edge, or the method of our ancestors of making it by casting and drawing on a mandrel, the great advance is apparent, but not more so than in the application of the same modern method of die drawing from a semi-molten condition to the production of pipe of any required curvature and diameter to form a trap as compared with the primitive and clumsy expedients of casting or beating by hand out of sheet-lead in halves and uniting by soldered seams, or endeavoring to bend and strain a cold lead tube around curves of too short radius, whereby the lead was so much compressed and thickened in places and thinned out and weakened in others as to be almost worthless. The serious defects of all these old forms are too well known to plumbers to need recital.

A great desideratum existed, which the present invention came to supply. The only question is was the applicant the first and original inventor of it, as he makes oath he is, for it seems superfluous to urge the distinguishability of this article in the market by qualities of its own apart from the process of manufacture. Aside from the striæ, which are accidental but inseparable, its uniformity of thickness, its flexibility as a tube, its density and absence of porosity, the absence of solder seams, its uniform diameter, and many other characteristics make it known to any one of the least experience with it, to say nothing of those engaged in the trade. As a patentable article indeed it runs extremely parallel, in the legal aspect, to the needle of Hopson & Brooks (C. D., 1871, p. 153),
57 and the arguments there urged for patentability apply with increased force here, by as much as this article is more distinguishable and also more valuable to the public and more widely useful and necessary by reason of the greater imperfections of the substitutes hitherto employed and the universality of the demand.

The only real question, however, as above stated, is one not gone into by the examiner, namely, Was the present applicant the ingenious and meritorious inventor who really was the first to conceive, devise, and produce this novel article and give it to the public? It is not closely connected, as occurs in so many instances, with priority in the devising of ingenious machinery for making it, for many such machines have been devised and many more are seen to be possible.

There are cases in which the novel product is inseparable, so far as we can see, from the novel mechanism for producing it, but that is not the case here. The article can be made and perhaps best made on ordinary lead-pipe machinery, in which there is no novelty whatever by manipulation alone. The invention lay solely in the ingenious conception or discovery carried into practice that by aid-

ing or increasing the flow of the plastic material on one side of the die discharge and checking it on the other the tube comes out curved, and that by proper management any curve desired can be produced. Thus these traps, ordinarily so expensive, cost little, if any, more than the common lead pipe of similar dimensions.

The patentability, therefore, will not be further questioned. It seems so obvious as to demand apology for such extended discussion as has already been given to it, and were it less obvious the affidavits of expert plumbers filed with the argument would render assurance doubly sure. There is, however, the all-important question of novelty to be considered before a patent can issue to a claimant.

The records of the office in interference cases involving machinery for the production of the article indicate the existence of what might amount to references for the article itself sufficient to
58 raise the question of priority of inventorship. None such, however, have been cited; and though it would seem proper to treat the case in full and not dole out possible obstacles to patentability piecemeal we cannot go outside of the record on which the appeal is taken and make up a case not passed upon by the examiner. As such reasons for withholding a patent, however, are known to us, and notably the patent to Geo. W. Wicks, No. 175,265, we have no resource but to comply with rule 43 in such case made and provided and make a statement to the Commissioner to the effect that a certain reference exists in the above-named patent which would seem to be a bar to the issue of a patent to McCloskey for what he now claims. The decision of the examiner on the case as presented is reversed.

H. H. BATES,
V. D. STOCKBRIDGE,
Examiners-in-Chief.

Ex'd: G. Q. C.

59 United States Circuit Court, Southern District of New York.
In Equity.

JOHN MCCLOSKEY, Complainant,
against
ROBERT HAMILL, Defendant.

SIR: Please take notice that on Friday, December 2d, 1881, at one o'clock p. m., at his office, No. 78 U. S. post-office building, in the city of New York, before John A. Shields, Esq., United States commissioner and a standing examiner of said court, I shall proceed to take testimony on the part of defendant under and pursuant to the sixty-seventh rule in equity of the Supreme Court of the United

States as amended. You are invited to be present and cross-examine.

New York, Nov. 30, 1881.

HOWARD A. SPERRY,
Solicitor for Defendant.

To James A. Whitney, solicitor for complainant, 140 Nassau St., New York city.

60 United States Circuit Court, Southern District of New York.
In Equity.

JOHN MCCLOSKEY, Complainant,
against
ROBERT HAMILL, Defendant.

Proofs for final hearing on behalf of defendant, taken before John A. Shields, examiner, on the 2d day of December, 1881, pursuant to the 67th rule in equity as amended of the Supreme Court of the U. S.

Present: James A. Whitney, Esq., counsel for compl't; Howard A. Sperry, Esq., counsel for def't.

Defendant's counsel puts in evidence letters patent granted to James Allen Lowe September 27, 1859, No. 25572, for improvement in moulding water traps.

61 Same marked Def't's Exhibit A, Dec'r 2, 1881, J. A. S.

Objected to as incompetent, irrelevant, and immaterial, the subject-matter of the paper referring in express terms to matters and things separate, distinct, and different from the subject-matter set forth in claims of the complainant's patent herein.

Defendant's counsel offers in evidence certified copy of letters patent of the United States granted to James A. Lowe, dated Dec. 20, 1859, No. 26506, for improvements in water traps.

Same marked "Def't's Exhibit B," Dec'r 2, 1881, J. A. S., Ex.

Objected to by complainant's counsel on the same grounds as the objection to Exhibit A.

MICHAEL GEARY, a witness produced on the part of the defendant, *and* being duly sworn, deposes and says:

Q. 1. Mr. Geary, what is your business?
A. Plumber.
Q. 2. What is your age?
A. Forty-four.
Q. 3. How long have you been a plumber?
A. Twenty-eight years.
Q. 4. Where?
A. In New York city; one year in Bridgeport, Connecticut.
Q. 5. Have you been a practical plumber and have you been familiar with the trade?
A. Yes, sir; during all that time.

Q. 6. Did you ever see that trap which I now hand you and are you familiar with it?

62 A. Yes, sir; I have seen the same trap as this over fifteen years ago—maybe eighteen, but I am sure it is fifteen.

Q. 7. Have you known of its actual manufacture and use during that time?

A. I have used it over fifteen years ago myself.

Trap offered in evidence; same marked Defendant's Exhibit C, Dec'r 2, 1881, J. A. S., Ex'r.

Complainant's counsel requests an adjournment until to-morrow at 10 or 11 o'clock for the reason that there is now pending before Judge Blatchford a motion in another action, Adams & Westlake M'f'g Co. *v.* Howard & Morse, against which motion complainant's counsel appears, and which motion may be called at any moment, complainant's counsel having waited for that purpose all the forenoon of this day. Complainant's counsel has given the whole of the recess to this present examination, and feeling that his presence is required in the court-room insists on an adjournment herein.

Defendant's counsel refuses to adjourn, because he has two witnesses in attendance whose time is valuable to them and he desires to avoid bringing them to court again.

Complainant's counsel says that the best he can do is to arrange to be informed when the motion is called, and that thereupon he will be obliged to leave this examination, and he protests against being compllled to continue under the circumstances.

Defendant's counsel insists on going on.

63 Direct examination of the witness, Michael Geary, closed.

And in answer to cross-questions by JAMES A. WHITNEY, Esq., counsel for complainant, the witness says:

X Q. 8. You say in your answer to question 6 that you have seen the same trap as this one, Defendant's Exhibit C, over fifteen years ago—maybe eighteen. Do you mean that it was this identical trap or one like it?

A. I meant the Lowe cast trap.

X Q. 9. Do you know how this identical trap, Defendant's Exhibit C, was made?

A. I never saw the process. I believe it to be cast in a mould of some kind, but never saw how.

X Q. 10. Then that is a trap made out of cast lead, is it?

A. The trap is cast, I should say.

X Q. 11. Do you know whether the Lowe cast traps, as they are termed, are made by the same operation or process by which such traps were made fifteen or eighteen years ago?

A. I don't know.

X Q. 12. Do you know whether the Lowe cast traps, so called, are of a better or worse quality now than they were when they were first made?

A. I believe them to be about the same.

X Q. 13. Do you not know that when the cast traps were first made they were very defective compared to what they are now?

A. No; I never used one that I found defective.

X Q. 14. What do you mean by defective?

A. Unfit for use.

X Q. 15. Where were you born?

A. New York city.

X Q. 16. Have you lived here all your life except the year in Bridgeport you have spoken of?

A. Yes, sir.

64 X Q. 17. Have you served a regular apprenticeship to the trade of a plumber?

A. Yes, sir.

X Q. 18. Who with?

A. Three years with C. Pitt & Son, Third avenue and St. Mark's Place; finished my term with R. C. Brown, corner of Market street and East Broadway.

X Q. 19. How long were you with Mr. Brown?

A. Not certain to a month; about three years.

X Q. 20. Where did you go then?

A. I went to Jersey City?

X Q. 21. Who with.

A. Capron, in Newark avenue.

X Q. 22. How long were you with Mr. Capron?

A. Somewhere in the neighborhood of a year, I think.

X Q. 23. Did you reside in Jersey City while you were with Mr. Capron?

A. No, sir; in New York.

X Q. 24. Where did you go after you left Mr. Capron?

A. Came back to work in New York and worked for McEntee & Williamson, 207 Bowery.

X Q. 25. How long were you with McEntee & Williamson?

A. I can't remember. I worked for them several times; the first time was pretty well on to a year, I judge. I can't say for certain.

X Q. 26. Where did you go then; who did you work for next?

A. I am now getting somewhat mixed; can't recollect; think it was in Sixth avenue I went to work next; think it was for Boylan, in Sixth avenue; cannot remember how long I staid there.

X Q. 27. Well, how long do you think—some months or a year?

A. Well, it might have been a year; not certain.

X Q. 28. Are you certain that it was more than three months?

A. Yes, sir.

65 X Q. 29. Are you certain that it was more than six months?

A. I think it was.

X Q. 30. Are you positive it was?

A. No; I am not.

X Q. 31. Are you positive that it was more than five months?

A. No; I cannot say to a certainty what time it was. I am certain it was more than three months, but anything further than that I am not certain enough to swear.

X Q. 32. What year was it you were there?

A. I don't remember. I never kept dates concerning anything.

X Q. 33. Whom did you work for next?

A. Ramsden, in Fulton St., Brooklyn. The gentleman is now dead.

X Q. 34. How long was you with him?

A. Somewhere in the neighborhood of three years.

X Q. 35. Who did you work for next?

A. I think I next worked for McEntee.

X Q. 36. What year was that?

A. Can't remember the year.

X Q. 37. How long was you with McEntee that time?

A. That I can't tell to a certainty. I don't remember exactly; think it was less than a year; may not have been six months.

X Q. 38. Please state without my asking you repeated questions the various parties for whom you have worked since that time to the present, mentioning them in their regular order.

A. The next party I worked for was Alfred Hopkins, in Bridgeport, Conn., about one year; next I worked for a short time for Mallegant & Stoltz, in Bleeker street, New York, about one month, I think, as near as I can recollect; the next employment was my present employer, Mr. Thomas Carter, now at 3 Bleeker St.
66 I have been in his employment fourteen or fifteen years. I worked for a short time before going to Mr. Carter's with some party in 2nd avenue near 24th street; the name I do not remember.

X Q. 39. Look into the ends of this trap, Defendant's Exhibit C. Does it not appear to you as if *it* they had been scraped out inside?

A. There are marks in there. I don't know how they were produced.

X Q. 40. In what year did you first see the Lowe cast traps of which you have spoken?

—. I can't say positively what year. It was over fifteen years ago. That is nearest I can answer.

X Q. 41. Where did you first see the Lowe cast trap?

A. In New York city.

X Q. 42. Whereabouts in New York city?

A. I am not positive. I think it was when I was working for McEntee first; I am not certain.

X Q. 43. Then you can't tell precisely when or where you first saw these cast traps, can you?

A. No, sir; not precisely. I can't say where it was, but it was in some shop I was working in. That is as near as I can come to it.

MICHAEL GEARY.

Sworn to before me this 2nd day of December, 1881.

JOHN A. SHIELDS, *Examiner.*

MICHAEL HANRAHAN, a witness produced on the part of the defendant, being first duly sworn and examined by HOWARD A. SPERRY, Esq., counsel for defendant, — :

Q. 1. What is your name, age, residence, and occupation?
67 A. My name is Michael Hanrahan; age, forty-nine years; residence, 215 East 23rd St., New York city; occupation, journeyman plumber.

Q. 2. How long have you been a plumber?

A. Thirty-one years.

Q. 3. Where?

A. In New York city.

Q. 4. Have you been a practical plumber, and are you familiar with the trade?

A. Yes, sir.

Q. Have you ever seen this trap which I now show you, Defendant's Exhibit C, and are you familiar with it, and how long have you been familiar with it?

A. I have been familiar with it for at least fifteen years; maybe more. I can't remember date.

Q. 6. Have you been familiar with its actual manufacture and use during that time?

(Objected to as leading.)

A. No, sir.

Q. 7. Do you know of its actual use during that time?

A. Yes.

Q. 8. How long ago do you remember traps of that description being used?

A. About fifteen years.

Direct examination of this witness closed.

And in answer to cross-questions by JAS. A. WHITNEY, Esq., counsel for complainant, he says:

X Q. 9. When did you first see this trap, Defendant's Exhibit C?

Counsel of complainant protests against the interruption of Defendant's counsel.

A. I cannot say the exact date, but the nearest I can get to it is fifteen years ago.

68 X Q. 10. Where has that trap, Defendant's Exhibit C, been all that time, so far as you know?

A. Well, it has been used around——

Counsel for complainant repeats his protest against the running comments of defendant's counsel, such comments being evidently intended to influence the witness.

X Q. 11. It has been used around where?

A. I can't answer that question.

X Q. 12. Where did you see it used?

A. I can't remember.

X Q. 13. Will you swear that that trap, Defendant's Exhibit C, has ever been used at all? Please look at it carefully and answer me.

A. Yes; it has. I don't mean that trap. I mean the Lowe trap.

X Q. 14. Then you don't mean to say that that trap has been used?

A. No, sir; not that special trap.

A. Well, what I mean to say is that it was a trap called the Lowe

X Q. 15. Then it was some other trap that you say was used, was it?

trap, the Lowe patent trap.

X Q. 16. Were the traps which you say were used made according to the Lowe patent?

A. Yes, sir.

X Q. 17. Were they identical with the trap in the Lowe patent?

A. Yes.

X Q. 18. Do you know how the Lowe patent trap was made?

A. No, sir.

X Q. 19. Those Lowe traps were made by casting lead into some kind of a mould, were they not?

A. I have no knowledge as to how they were made.

X Q. 20. Do you know whether the lead in them is in the condi-

of cast lead or not?

69 A. I don't know. I know the trap goes by the name of the cast trap.

X Q. 21. What do you understand by the word "cast trap;" do you not understand that it means a trap made of cast lead?

A. Yes, sir.

X Q. 22. Did you serve a regular apprenticeship as a plumber?

A. Yes, sir.

X Q. 23. How long an apprenticeship did you serve?

A. About five years.

X Q. 24. Have you been a journeyman plumber ever since you finished your apprenticeship?

A. Yes, sir.

X Q. 25. In whose employ are you at the present time?

A. Mr. Thomas Carter, No. 3 Bleeker St., New York.

X Q. 26. How long have you been employed by him?

A. Well, I can't state exactly. Off and on for the last fifteen years, I think.

X Q. 27. Did not John McCloskey, the complainant in this suit, work for Mr. Carter at one time, since you went into Mr. Carter's employ?

A. Yes, sir.

X Q. 28. Did you not at that time have a quarrel or dispute with said John McCloskey?

A. No; I had a quarrel with Mr. Carter, and I left Mr. Carter, and he told Mr. Carter he would get a man in my place; that was all.

Defendant's counsel charges the complainant's counsel with attempting to mislead the witness.

Complainant's counsel repels the charge and refers the court to the protests as to the course of defendant's counsel heretofore noted.

70 Redirect examination by Mr. SPERRY:

Redirect Q. 29. In speaking of your knowledge of the use of the Defendant's Exhibit C, in the first part of your cross-examination, did you mean to say that you had known of the actual use of this identical trap for the length of time spoken of?

(Objected to as leading.)

A. Yes.

Redirect Q. 30. This identical trap. What did you mean?

A. The trap called the patent Lowe trap.

Redirect Q. 31. Is this trap, Defendant's Exhibit C, one of those traps?

A. Yes, sir.

Redirect examination closed.

MICHAEL HANRAHAN.

Sworn to before me this 2nd day of December, 1881.

JOHN A. SHIELDS, *Examiner.*

Adjourned to Tuesday, December 6, 1881, at 2 p. m., by consent.

NEW YORK, *December* 6, 1881—2 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel as before.

Defendant's counsel rests his defense.

71 DEF'T'S EX. A. Dec'r 2, 1881. J. A. S., Ex'r.

(2–175.)

DEPARTMENT OF THE INTERIOR.

(Cut.)

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted James Allen Lowe September 27, 1859, No. 25572, for improvement in moulding water traps.

In testimony whereof I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this eighteenth day of November, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[Patent Office Seal.]

E. M. MARBLE,
Commissioner.

72 No. 25572.

UNITED STATES OF AMERICA.

(Cut.)

To all to whom these letters patent shall come:

Whereas James Allen Lowe, of New York, New York, has alleged that he has invented a new and useful improvement in moulding water traps, which he states has not been known or used before his application; has made oath that he is a citizen of the United States, that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement and praying that a patent may be granted for that purpose:

These are, therefore, to grant, according to law, to the said James Allen Lowe, his heirs, administrators, or assigns, for the term of fourteen years from the twenty-seventh day of September, one thousand eight hundred and fifty-nine, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given, in the words of the said James Allen Lowe, in the schedule hereunto annexed, and is made a part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the city of Washington, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States of America the eighty-fourth.

73 JACOB THOMPSON,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

[SEAL.] WM. D. BISHOP,
Commissioner of Patents.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, James Allen Lowe, of the city, county, and State of New York, *has* invented a new and useful improvement in moulds for the manufacturing of plumbers' traps; and I do hereby declare the following to be a full and exact description of the same, reference being had to the accompanying drawings and to the letters of reference made thereon.

Fig. 1 is a view of half a mould for a double S trap with the core lying in it.

Fig. 2 is a longitudinal section of the core through the parting of the mould.

Fig. 3 is a cross-section of core through red line.

Fig. 4 is a cross-section of mould and core through red line.

Figs. 5, 6, 7 are details of pieces *p p*, C C, L L.

74 In plumbing work it is necessary where connections are made with sewers or sinks to guard against effluvia rising through the pipes into the house. It is done by placing what is termed by plumbers a trap in the pipe, which is some peculiar turn in the pipe by which the lower part of the turn is always full of water, through which the effluvia cannot rise.

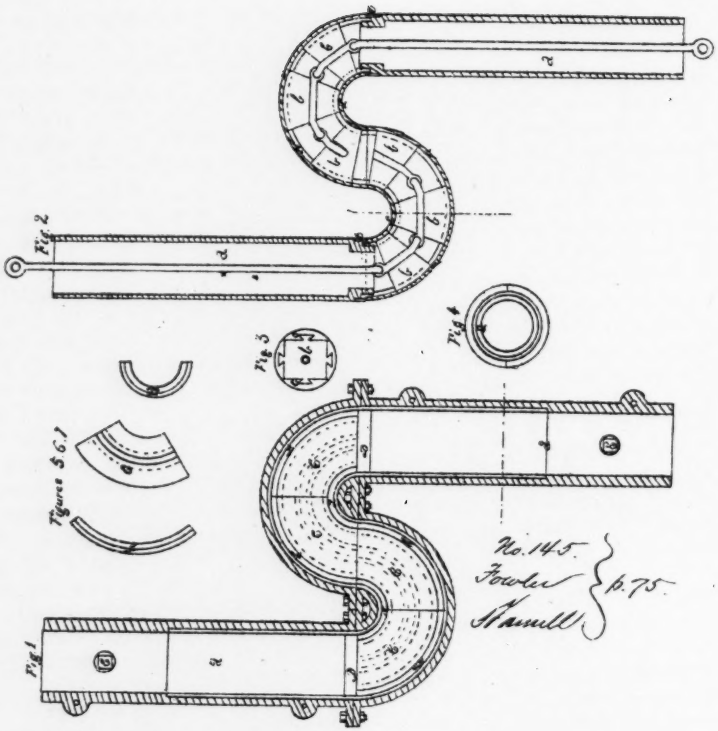
The present manner of constructing traps is to take two pieces of sheet lead, bend them over an iron form or otherwise, and fit them and solder them together, and as the solder is softer than lead the trap must be weaker in the seam than elsewhere; also when formed the sheet lead is thinner in the bend, the place where the most strength is required, when by casting them these difficulties are completely obviated, not only making the trap equal in strength all over or even thicker in certain parts if required, but also being a saving in labor as well as in the consumption of solder; but in casting, the traps being such peculiar shapes, it is necessary to have a core that can be drawn without injury to the trap, which is so easily bent that sand cores cannot be used; but by constructing a metal core in the following manner it can be drawn easily without injury to the trap:

First turn a metal ring whose section will show a square with dovetails on all sides like those shown in Fig. 3; then turn other rings from which to make the pieces C C, also *h h* and L; then cut a piece out of the first ring large enough to slide all the other pieces on to their places, which, when all — on, will form a circle, which must then be turned round, and now, removing the outside pieces, cut from the first ring the six plugs *b b* shown in the drawing; then join three together with wire eyes so they will form a circle or straight line with ease, to one end of which attach a wire or chain sufficiently long to reach out of the straight part of the trap; then,

75 placing the outside pieces again upon the plugs so as to form two half circles, into one end of each chase a screw as small as the square will permit, into which fit the hollow cylinder *a*, upon which shrink the collar D and let it be shouldered down far enough on the outside pieces to press them firmly against the screw on the cylinder. This gives us the core in two pieces; and now, by fitting the centre joint with short steady pins and by screwing one-half into a mould with long bearings, as shown in Fig. 1, and drawing the other half firmly against it, it will tightly close all the cross-joints of the core, while the dovetails on the plugs will hold the longitudinal joints equally tight if well fitted. Now, close the mould and it is ready for casting. After casting unscrew the hollow cylinders, draw them out, also the plugs, by means of the chain or wire attached to them, and all that remains is the outside pieces, which

J. A. Lowe,
Mould.

No 25572. Patented Sep 27 1859



Witnesses:
Henry Langhorne
Wm G. Burns

Inventor:
James Allen Lowe

can be drawn (by metal hooks, the ends of which are fitted into holes bored on the inside of said pieces), leaving a perfect trap.

What I claim as my invention and desire to secure by letters patent is—

The application of a metallic core constructed and operating substantially as herein described to cast water traps.

JAMES ALLEN LOWE.

Witnesses:
HENRY LANGHORNE.
WM. L. BURNS.

Ex'd: E. L. L. C. F.

(Here follows diagram marked p. 76.)

77 DEF'T'S EX. B. Dec'r 2, 1881. J. A. S., Ex'r.

(2–175.)

DEPARTMENT OF THE INTERIOR.

(Cut.)

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted James A. Lowe December 20, 1859, No. 26506, for improvement in water traps.

In testimony whereof I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this eighteenth day of November, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[Patent Office Seal.]

E. M. MARBLE,
Commissioner.

No. 26506.

UNITED STATES OF AMERICA.

(Cut.)

To all to whom these letters patent shall come:

Whereas James A. Lowe, of New York, New York, has alleged that he has invented a new and useful improvement in water
78 traps, which he states has not been known or used before his application; has made oath that he is a citizen of the United States, that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same

hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement and praying that a patent may be granted for that purpose:

These are, therefore, to grant, according to law, to the said James A. Lowe, his heirs, administrators, or assigns, for the term of fourteen years from the twentieth day of December, one thousand eight hundred and fifty-nine, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said James A. Lowe in the schedule hereunto annexed, and is made a part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the city of Washington, this twentieth day of December, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States of America the eighty-fourth.

JACOB THOMPSON,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.
[SEAL.] WM. D. BISHOP,
Commissioner of Patents.

79 The schedule referred to in these letters patent and making part of the same.

Be it known that I, James A. Lowe, of the city and county of New York, have invented an improvement in the manufacture of "water traps," of which I declare the following to be a description and the annexed drawings a representation.

Figs. Nos. 1 and 2 are a full view of an S and double S trap.

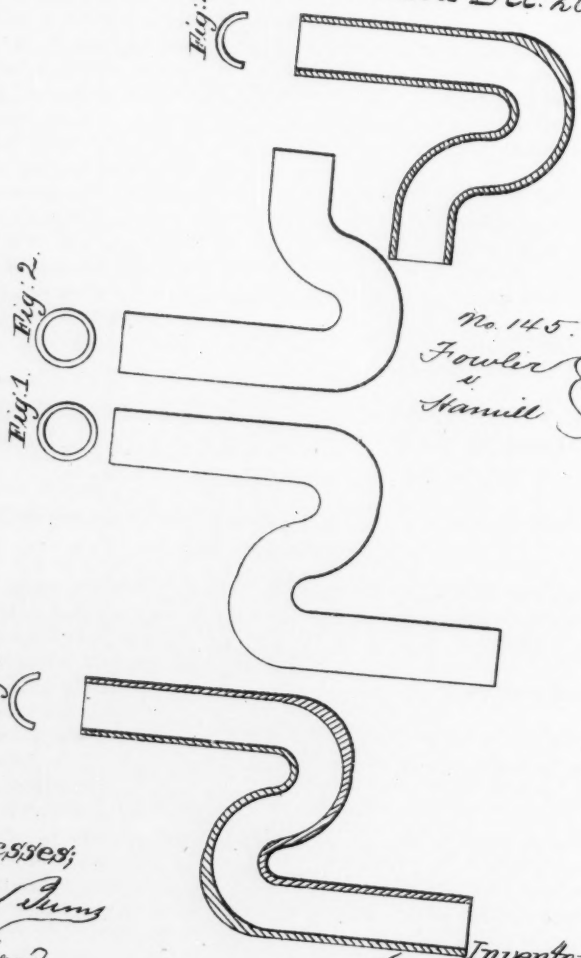
Fig. 2 is a longitudinal section of the same.

These traps are cast in a "metallic mould" with a "metallic core," constructed and operating as shown in the specification of a patent granted to the said James A. Lowe by the "United States," bearing date September 27th, 1859.

By this manner of manufacturing some advantages are derived, such as great strength, it being one piece of metal, a smooth interior of an equal size all through, consequently less liable to choke or stop up; also, when used in "water-closets," the acids which frequently form there will not affect them, as they can be made of pure lead, while in the present mode of manufacturing the seams on the side where the two pieces are soldered together frequently part from the acid eating the tin out of the solder and weakening it.

Also in freeing traps when stopped (which is done by fitting a plunger in the upright part of the trap and working water into it till the obstruction is forced out).

J. A. Lowe,
Water Trap,
No. 26,506, Patented Dec. 20, 1859.



No. 145. Fowler & Hamill } p. 81.

Witnesses;
Wm L Burns
K Langhorne

Inventor;
James A Lowe

80 In this operation it often occurs that an inexperienced person will strike the bend below, and it, being thin sheet lead, easily parts and destroys the trap.

To obviate this the trap shown in the drawing is double the thickness immediately below the upright pipe, and, in addition to its greater durability, it can be furnished at much less cost than those now in use.

The Claim.

I claim the "water traps" shown when cast without a seam (in lead or composition) as a new article of manufacture.

JAMES A. LOWE.

In witness—
WM. L. BURNS.
H. LANGHORN.

Ex'd: C. F. E. L. L.

(Here follows diagram marked p. 81.)

81½ Circuit Court of the United States, Southern District of New York. In Equity.

JOHN MCCLOSKEY *vs.* R. HAMILL.

SHIPMAN, *J.:*

This is a bill in equity to restrain the alleged infringement of letters patent No. 220,767, which were issued to John McCloskey on October 21, 1879, for an improved plumbers' trap of soft metal. This patent has been twice the subject of examination by Judge Wheeler in the circuit court for this district—McCloskey *v.* Du Bois, 8 Fed. Rep., 710, and 9 Fed. Rep., 38. The facts which the plaintiff proved upon the second hearing are the same which he relies upon in this case. Judge Wheeler's opinion was that the alleged invention which is the subject of this patent is not patentable. That must be taken to be the law of this circuit until either a state of facts is proved which shall present a different case or until the conclusion of law upon the facts as now shown shall be overruled by the
81¾ Supreme Court. My own examination of the case leads me to concur in the result which Judge Wheeler reached. The intention of the plaintiff in bringing this bill was probably to present the case in such a clear and accurate manner that the conclusion of Judge Wheeler might be properly examined by the Supreme Court.

The plea is sustained and the bill is dismissed.

(Endorsed:) U. S. circuit court, southern district of New York. John McCloskey *vs.* R. Hamill. Decision. Shipman, J. U. S. circuit court. Filed Feb. 19, 1883. Timothy Griffith, clerk.

82 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 20th day of April, 1883.

Present: Hon. Nathaniel Shipman, judge.

JOHN MCCLOSKEY, Compl't, *against* ROBERT HAMILL, Def't.

This cause having heretofore been brought to a hearing upon the pleadings and proofs therein before Hon. Nathaniel Shipman, holding said court, and having been argued by James C. Cloyd, Esq., and William J. Underwood, Jr., Esq., for the complainant, and by Howard A. Sperry, Esq., for the defendant, it is now, on motion of Howard A. Sperry, solicitor for said defendant, ordered, ad-
83 judged, and decreed, and the court, by virtue of the powers and authority therein vested, doth hereby order, adjudge, determine, and decree, as follows, viz:

That the said complainant's bill of complaint filed herein be, and the same is hereby, dismissed, and that the said complainant pay to the said defendants the costs of the suit, to be taxed, and that in default of paying thereof the said defendants have execution therefor according to law.

(Signed) N. SHIPMAN, *Judge.*

(Endorsed:) U. S. circuit court, southern district of N. Y. John McCloskey *vs.* Robert Hamill. Decree. U. S. circuit court. Apr. 21, 1885. Timothy Griffith, clerk.

84 (Vignette.)

The President of the United States of America to the marshal of the southern district of New York, Greeting:

You are commanded that of the goods and chattels of John McCloskey in your district you cause to be made the sum of ninety-two dollars and seventy cents, which lately in the circuit court of the United States for the southern district of New York, in the second circuit, Robert Hamill recovered against the said John McCloskey in an action between John McCloskey, plaintiff, and Robert Hamill, defendant, in favor of said Robert Hamill, as appears by the record filed in the clerk's office of said circuit court on the 16th day of June, one thousand eight hundred and eighty-three; and if sufficient personal property of the said judgment debtor cannot be found in your district that then you cause the same to be made out of the real property belonging to such judgment debtor on the above-mentioned day or at any time thereafter, in whose hands soever the same may be, and return this execution within sixty days after its receipt by you to the clerk of said circuit court.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, on the 29th day of June, one thousand eight hundred and eighty-three,

and of the Independence of the United States the one hundred and seventh.

[Seal U. S. Circuit Court.]

(Signed) TIMOTHY GRIFFITH, *Clerk.*

H. A. SPERRY,
Pl'ff's Att'y, 229 B'way, N. Y. City.

85 [Endorsed:] United States circuit court, southern district of New York. John McCloskey against Robert Hamill. Execution against the property. To the marshal: You will levy and collect $92.70 *dollars and seventy cents*, with interest from the 16th day of June, 1883, besides your fees, etc. H. A. Sperry, pl'ff's attorney, 229 Broadway, N. Y. U. S. circuit court. Filed Sep. 10, 1883. Timothy Griffith, clerk.

I have made diligent search and can find no goods or chattels, lands or tenements, of the within-named plaintiff in my district whereof I can make the amount of the within execution or any part thereof.

Dated N. Y., September 10th, 1883.

(S'g'd) JOEL B. ERHARDT,
U. S. Marshal.

U. S. MARSHAL'S OFFICE, NEW YORK, *June* 29, 1883.

I hereby depute John E. Dowley to serve the within writ.

(S'g'd) JOEL B. ERHARDT,
U. S. Marshal.

86 Circuit Court of the U. S., Southern District of New York.

JOHN MCCLOSKEY *vs.* R. HAMILL.

It is hereby stipulated between the solicitors for the respective parties in the above-entitled cause that the foregoing papers may constitute the record to be sent by the clerk of this court to the Supreme Court of the United States on the hearing on appeal in said Supreme Court, and that the exhibits may be retained by the clerk of this court until such hearing on appeal.

Dated Oct. 16, 1885.

(Signed) WM. S. BEAMAN,
For Appellant.

(Signed) F. H. SPERRY,
Sol'r for Appellee.

(Endorsed:) U. S. circuit court. Filed Oct. 16, 1885. Timothy Griffith, clerk.

87 Circuit Court of the United States, Southern District of New York.

SAMUEL W. FOWLER, Appellant, *vs.* ROBERT HAMILL, Appellee.

It is hereby consented that the clerk of the circuit court of the United States for the southern district of New York transmit to the clerk of the Supreme Court of the United States, as part of the record on the appeal in the above cause, copies of the following papers, which are hereby made part of said record:

1. Decree of the circuit court of the United States for the southern district of New York, filed on the 3rd day of December, 1884, in the suit in equity of Howard A. Sperry, complainant, *vs.* John McCloskey, defendant.

2. Order of said circuit court in said suit, filed on the first day of April, 1885, authorizing the receiver of said defendant to sell his property at public auction.

88 (Signed) WM. S. BEAMAN,
For Apppellant.

(Signed) H. A. SPERRY,
For Appellee.

(Endorsed:) U. S. C. C., S. D. N. Y. Samuel W. Fowler, appellant, *vs.* Robert Hamill, appellee. Stipulation incorporating certain papers in the record transmitted on appeal. Wm. S. Beaman, for appellant; Howard A. Sperry, for appellee. N. Y. city. U. S. circuit court. Filed Oct. 15, 1885. Timothy Griffith, clerk.

89 Received for record Aug. 29, 1885, and recorded in Liber Z 33, page 197, of transfers of patents.

In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed.

[Seal Patent Office United States of America.]

M. V. MONTGOMERY,
Commissioner of Patents.

Ex'd: F. C. T.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the third day of December, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Wm. J. Wallace, circuit judge.

HOWARD A. SPERRY *against* JOHN MCCLOSKEY.

A bill of complaint having been filed herein on the 4th day of September, 1884, and a subpœna having been duly issued herein returnable at the October term of this court, and same having been duly served upon the defendant, as appears by the marshal's return

heretofore filed, and the defendant having failed and refused to file any answer, demurrer, or notice of appearance thereto, as required by the said subpœna, and an order having been entered herein taking said bill *pro confesso*, and more than thirty days having elapsed since the entry of said order taking said bill *pro confesso*, now,
90 on motion of Howard A. Sperry, complainant and his own solicitor, and due deliberation having been had after reading the said bill of complaint, proof of service of said subpœna, and said order, it is hereby ordered, decreed, and adjudged, and the court, by virtue of the power and authority in it vested, does hereby order, adjudge, and decree, that Samuel R. Betts, Esq., counsellor-at-law, be, and he is hereby, appointed a receiver of all the money, property, real or personal, in law or equity, debts, choses in action, or equitable interests, patents, letters patent, inventions, parts of letters patents and inventions thereby secured, applications for letters patent and such when secured, contracts or agreements, and actions pending for any cause belonging to the defendant or held in trust for him, or which he is in any manner beneficially interested; that the said receiver execute and file with the clerk of this court a bond, conditioned for the faithful performance of his duties as such receiver and the due accounting for all moneys that may come into his hands as such, in the penal sum of five hundred dollars, and procure the same to be approved by a judge of this court.

And it is further ordered, adjudged, and decreed that the defendant be, and he is hereby, enjoined and restrained from selling, assigning, transferring, negotiating, discharging, receiving, collect-
91 ing, incumbering, or in any way or manner disposing of or intermeddling with any of his property or interests hereinbefore enumerated.

And it is further ordered that the receiver heretofore appointed herein may at any time apply to this court for such instructions as he may require.

And it is further ordered that the complainant have and recover of the defendant his costs, to be taxed.

(S'g'd) WM. J. WALLACE.

(Endorsed:) U. S. circuit court, 2nd circuit. Howard A. Sperry *vs.* John McCloskey. Decree. H. S. Sperry, compl't's solicitor, 229 B'way, N. Y. U. S. circuit court. Filed Dec. 3, 1884. Timothy Griffith, clerk.

Ex'd: T.

A copy.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

92 At a stated term of the United States circuit court, second circuit, southern district of New York, held at the U. S. courthouse, in the city of New York, on the 1st day of April, 1885.

Present: Hon. Wm. J. Wallace, circuit judge.

HOWARD A. SPERRY *vs.* JOHN MCCLOSKEY.

On reading and filing the petition of Samuel R. Betts, the receiver heretofore appointed herein, it is ordered that said receiver be, and he is hereby, authorized to sell at public auction, at the exchange sales-rooms in the city of New York, all the property, interests, and choses in actions, enumerated in the petition on which this order is granted, in which the defendant, John McCloskey, has any interest or is the owner; that a notice of such sale be published by said receiver by two insertions in the New York Daily Register, a newspaper published in the city of New York, at least six days prior to said sale, and that said sale be made for cash, and that said
93 receiver execute and deliver to the purchasers his bill of sale of the property, specifying particularly therein the property and interest sold and purchase price, and that he report to this court his doings under this order.

(Signed) WM. J. WALLACE.

94 SAMUEL W. FOWLER, Appellant,

vs.

ROBERT HAMILL, Respondent.

To the honorable the Supreme Court of the United States:

The appeal of the above-named Samuel W. Fowler respectfully shows—

That on the 9th day of September, 1881, John McCloskey, of the city of New York, filed his bill in the circuit court of the United States for the second circuit and southern district of New York against the above-named defendant and respondent, alleging that on the 21st day of October, 1879, letters patent of the United States numbered 220,767 were issued to the said McCloskey for a new and useful improvement in soft-metal traps, whereby there was granted to the said McCloskey, his heirs or assigns, for the term of seventeen years from the 21st day of October, 1879, the exclusive right to make, use, and vend the said invention throughout the United
95 States and the territories thereof.

The said bill of complaint further alleged, upon information and belief, that the above-named respondent had unlawfully made, used, and sold the said invention within the said southern district of New York in violation of the rights of the said McCloskey, and that thereby the above-named respondent had received great gains and profits, to the great damage and injury of the said McCloskey; and said bill of complaint prayed that the above-named respondent might be decreed to account for and pay over his said unlawful gains and profits to the said McCloskey, and also pay to said McCloskey the damages sustained by him by reason of the aforesaid unlawful acts of the above-named respondent; and the said bill of complaint further prayed for an injunction restraining the above-named respondent and his servants from making, using, or vending the said invention.

That on the 15th day of November, 1881, the plea of the above-named respondent was filed in said suit, alleging, on information and belief, that the said McCloskey was not the original and first inventor of the improvement described in said letters patent or of any substantial part thereof. It further alleged that long before the said patented invention by the said McCloskey all the material parts thereof were in use by sundry persons in the United States, and that prior to the said invention by the said McCloskey *all the material parts thereof were in use by sundry persons in the United States, and that prior to the said invention by the said McCloskey* the improvement therein described and claimed had been described and patented in certain letters patent of the United States, and the above-named respondent prayed judgment upon his said plea.

96

And thereafter, on the 22nd day of November, 1881, the replication of the said McCloskey was filed in the said suit.

And thereafter proofs were adduced before an examiner of said court in said suit by the respective parties, which proofs were duly filed therein.

And thereafter the said cause came on to be heard at the April term of said court for the year 1883, before the Honorable Nathaniel Shipman, district judge of the district of Connecticut, and upon the pleadings and proofs, and was argued by counsel, and on the 21st day of April, 1883, a decree was made in said suit and duly entered, whereby it was ordered, adjudged, and decreed that the said bill of complaint be dismissed, and that the said McCloskey pay to the above-named respondent the costs of said suit, to be taxed, and thereupon the said costs were taxed; and on the 16th day of June, 1883, the final decree was entered in said cause, including judgment for the amount of said costs as taxed, and execution was duly issued for said costs to the marshal of the United States for the southern district of New York, where the said McCloskey then resided; and thereafter the said execution was duly returned by the said marshal wholly unsatisfied.

97

And thereafter the above-named respondent sold, assigned, and transferred to Howard A. Sperry, of the city of New York, who had been his solicitor and counsel in said cause, all his, the said respondent's, right, title, and interest in and to the said judgment for said costs, the execution upon which as aforesaid had been returned wholly unsatisfied.

98

And thereafter, on or about the 4th day of September, 1884, the said Sperry filed a bill in the circuit court of the United States for the southern district of New York against the said McCloskey to reach the property and assets of said McCloskey in order therefrom to satisfy the said judgment for costs.

And the subpœna to the said McCloskey to appear and answer said bill was duly served upon said McCloskey, and the said subpœna was duly returned to the court with due proof of service; but the said McCloskey failed to appear and answer the said bill of complaint on the return day of said subpœna, and thereafter a rule was duly entered taking the said bill of complaint *pro confesso*, and

a decree was made on the 3rd day of December, 1884, taking the said bill *pro confesso* against the said McCloskey and appointing
99 Samuel R. Betts receiver of the property of said McCloskey of every nature and description, and said receiver duly qualified as such and gave the required bond; and thereafter the said receiver, on the — day of April, 1885, at public auction, in the city of New York, and in pursuance of an order of said court, sold the said property of said McCloskey of every nature and description which had become vested in him by virtue of said decree as aforesaid, including the right, title, and interest of said McCloskey in the letters patent on which the aforementioned suit was brought against the above-named respondent as aforesaid, and all rights of the said McCloskey in said suit; and the said property sold as aforesaid was purchased of said receiver for good and valuable consideration by Sidney Osborne, of the city of New York, and the said receiver, in his capacity as such, on the — day of April, 1885, executed and delivered to the said Sidney Osborne a bill of sale of said property purchased by said Osborne as aforesaid.

100 And thereafter, on the 24th day of April, 1885, the said Sidney Osborne sold, assigned, and transferred unto Samuel W. Fowler, of the city of New York, all his, the said Osborne's, right, title, and interest in said property sold by said receiver as aforesaid, including all the right, title, and interest of the said McCloskey in and to the aforementioned letters patent and the suit brought upon the same by said McCloskey against the above-named respondent, and the said Samuel W. Fowler has ever since been and still is the owner of all the property and rights granted to him as aforesaid, and all the aforesaid transfers made by instruments in writing have been by him duly recorded in the Patent Office of the United States.

Wherefore this appellant appeals from the decree which dismissed the bill as aforesaid, and respectfully prays that the decree of the said circuit court in said cause of McCloskey against the above-named respondent and the bill, plea, pleadings, depositions,
101 evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and the said decree of the circuit court and every part thereof may be reversed and a decree made therein sustaining said letters as valid, or such other decree as to the said Supreme Court shall seem just.

Dated N. Y., June 15, 1895.

(Signed) WM. S. BEAMAN,
Solicitor for Appellant.

Appeal allowed.
June 16, 1885.
(Signed) HOYT H. WHEELER.

(Endorsed:) U. S. circ. c't, so. dist. of New York. In equity. John McCloskey *vs.* Robert Hamill. Petition of appeal from decree of June 16, 1883. Wm. S. Beaman, solicitor for appellant, 140

Nassau street, New York. U. S. circuit court. Filed June 19, 1885. Timothy Griffith, clerk.

Due and timely service of the within petition of appeal is hereby admitted.

Dated N. Y. June 19, 1885.

(S'g'd) H. A. SPERRY,
Sol'r for Resp't.

102 Supreme Court of the United States.

Know all men by these presents that we, Samuel W. Fowler, of 165 10th street, Brooklyn, New York, and Charles Ergenzinger, of Brooklyn, N. Y., and Thomas G. Little, of the same place, are held and firmly bound unto Robert Hamill, of Greenburgh, New York, in the sum of two hundred dollars, to be paid to the said Robert Hamill, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 17th day of June, 1885.

Whereas the above-named Samuel W. Fowler has perfected an appeal to the Supreme Court of the United States to reverse the decree made in the cause of John McCloskey, complainant, against the above-named Robert Hamill, respondent, on the 16th day of June, 1883, by the circuit court of the United States for the southern district of New York:

103 Now, therefore, the condition of this obligation is such that if the above-named Samuel W. Fowler shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) SAMUEL W. FOWLER.
(Signed) CHARLES ERGENZINGER.
(Signed) THOS. G. LITTLE.

Sealed and delivered in presence of—
(S'g'd) E. H. WINCHESTER.

STATE OF NEW YORK, } *ss:*
County of Kings, }

Samuel W. Fowler, Charles Ergenzinger, and Thomas G. Little, being severally duly sworn, says that he is a resident of Brooklyn, N. Y., and a householder in said city, and that he is worth the sum of four hundred dollars over and above his just debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

104 (S'g'd) SAMUEL W. FOWLER.
(S'g'd) CHARLES ERGENZINGER.
(S'g'd) THOS. G. LITTLE.

Sworn to before me this 17th day of June, 1885.

(S'g'd) E. H. WINCHESTER,
Notary Public for Kings Co.

(Endorsed:) U. S. circuit c't, so. dist. of New York. In equity. John McCloskey (Samuel W. Fowler), appellant, *vs.* Robert Hamill, respondent. Bond on appeal from decree of June 16, 1883, in McCloskey *v.* Hamill. Approved. (S'g'd) Hoyt H. Wheeler. Wm. S. Beaman, sol'r for S. W. Fowler, appellant, 140 Nassau St., New York. U. S. circuit court. June 17, 1885. Timothy Griffith, clerk.

105 By the Hon. Hoyt H. Wheeler, judge of the district court of the United States for the district of Vermont and acting as circuit judge in the southern district of New York, to Robert Hamill:

Whereas Samuel W. Fowler has lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the southern district of New York on the 16th day of June, 1883, made in favor of you, the said Robert Hamill, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, the 16th day of June, 1885.

(Signed) HOYT H. WHEELER.

(Endorsed:) U. S. circuit court, so. dist. of New York. In
106 equity. John McCloskey *vs.* Robert Hamill. Citation on appeal by Samuel W. Fowler from final decree of June 16th, 1883. Wm. S. Beaman, sol'r for appellant, 140 Nassau St., New York. U. S. circuit court. Filed June 19, 1885. Timothy Griffith, clerk.

107 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to one hundred and six, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of John McCloskey, on the part of Samuel W. Fowler, appellant, against Robert Hamill, respondent, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixteenth day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the said United States the one hundred and tenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 145. Samuel W. Fowler, appellant, *vs.* Robert Hamill. Filed October 17, 1885.

FILED
MAR 23 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 4.

SAMUEL W. FOWLER,

Appellant,

vs.

ROBERT HAMIL.

BRIEF FOR APPELLANT ON APPEAL.

FREDERIC H. BETTS,

Of Counsel for Appellant.

C. G. Burgoyne, 146-150 Centre Street, New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

SAMUEL W. FOWLER,
Appellant,

vs.

ROBERT HAMIL.

No. 4.

BRIEF FOR SAMUEL W. FOWLER, APPELLANT ON ABOVE APPEAL.

Statement.

The bill in this case was filed to restrain the infringement of the letters patent granted to John McCloskey on the 21st day of October, 1879, No. 220,767, for a certain new and useful improvement in soft metal traps. The bill was filed on the 9th day of September, 1881, and is in the usual form, alleging the grant of the patent and charging infringement (Rec., pp. 2, 3, 4, 5, 6). The patentee, John McCloskey, was the original complainant herein, but Samuel W. Fowler having by assignment become the owner of all the interest of said McCloskey, both in the subject matter of this suit and in said letters patent, has been substituted herein in place and stead of said McCloskey and is now the appellant herein (Rec., pp. 52, 53, 54).

A plea was filed on the 15th day of November, 1881, alleging, on information and belief :

1. That said McCloksey was not the original and first inventor of the improvement described in said letters patent.

2. That said improvement had been in public use in the United States long before it was patented by said McCloskey.

3. That said improvement had been patented and described in certain letters patent of the United States, and in various other letters patent and printe l publications (Rec., pp. 7, 8).

Replication was filed and proofs taken (Rec., p. 9).

The case came on to be heard before his Honor Judge NATHANIEL SHIPMAN, who rendered an opinion, reported in 15 Federal Reporter (Rec., p. 47).

A decree was rendered on the 21st day of April, 1883, adjudging that said bill of complainant be dismissed with costs against the complainant (Rec., p. 48).

Final decree was entered on the 16th day of June, 1883, dismissing said bill of complaint, and granting judgment for $92.70 costs to the defendant.

From this decree said Samuel W. Fowler (who became assignee of the patent) appealed.

Assignment of Errors.

The Court below erred :

1. In holding that the invention is not patentable.

2. In dismissing the bill for that or any cause.

FIRST POINT. The case was not heard in the Court below under conditions favorable to an exhaustive consideration of the merits.

This patent had been twice before Judge WHEELER in another case (*McCloskey vs. Dubois*, 8 Fed. Rep., 710, and 9 Fed. Rep., 38), and Judge SHIPMAN in this case said: "That (referring to Judge WHEELER's previous disposition of the patent) must be taken to be the law of this circuit."

Judge WHEELER heard the Dubois case in the first instance (8 Fed. Rep., 710), with very little evidence before him. He said that he took *judicial notice*, since no evidence is adduced, that traps "may be either molded or wrought or drawn of the same quality, and are apparently of the same quality when done."

In the second instance (9 Fed. Rep., 38), Judge WHEELER denied a motion to introduce evidence tending to prove facts contrary to those of which he had taken judicial notice in deciding the case the first time. It does not appear in detail just what this new evidence was, but he says that it tended to show many different properties possessed by cast traps and wrought traps respectively. Either the proposed evidence was insufficient or Judge WHEELER could not clearly have understood it nor have given it exhaustive consideration; for, in enumerating some of the qualities which it tended to show rendered the wrought lead trap superior to the cast lead trap, he says the one is "more elastic" than the other. Now, if there is anything in the case of which the Judge might have taken judicial notice, it is that all lead, either cast or wrought, is *non*-elastic. In the evidence before the Court the only references to this property of lead are attempts of defendant's counsel to discredit complainant's expert witnesses by entraping them into saying that wrought or die-drawn lead is more elastic than cast or molded lead (Rec., p. 15, x-Q. 5; p. 23, x-Q. 15, and p. 27, x-Q. 9).

Judge SHIPMAN, in deciding the case, also says: "The intention of the plaintiff in bringing this bill was probably to present the case in such a clear and accurate manner that the conclusion of Judge WHEELER might be properly examined by the Supreme Court"

(Rec., p. 47). It seems to have been understood between the counsel and the Court that an appeal was to be taken by the plaintiff, and the decision in this case was little more than a decision *pro forma*.

SECOND POINT. The defense is nominally by plea; but to entitle the defense to consideration on the merits the so-called plea must be treated as an answer.

Two statutory defenses are set forth in what is apparently a double plea.

I. The plea, *as such*, is improper, and if treated merely as a plea ahould be overruled—

(a) Because it is a DOUBLE PLEA.

See *Giant Powder Co. vs. Safety Powder Co.*, 19 Fed. Rep., 509.

In this case Judge SAWYER says: "In fact, the proposed amended plea sets up all the defenses that can be made to a patent, and it would involve the trial of the whole case, with the exception of the single question of infringement. The object of a plea, when there is some certain single issue requiring but little evidence that will dispose of the whole case, if sustained, is to try that issue without putting the parties to the expenses of the trial of the case at large, and pleas are limited to a single defense or issue, unless, by permission of the Court, the defendants are allowed to plead double."

To the same effect is

Reissner vs. Anness, 3 B. & A., 148.

(b) Because the statutory defenses set up in the so-called PLEA *can be presented by* "ANSWER" *only.*

U. S. Rev. St., Section 4920.

Carnrick vs. McKesson, 8 Fed. Rep., 807.

Sharp vs. Reissner, 20 Blatch., 10.
Hubbell vs. De Land, 14 Fed. Rep., 471.
Korn vs. Wiebach, 33 Fed. Rep., 50.

In *Carnrick vs. McKesson* (above) Judge BLATCHFORD said: "The clear purport of Section 4920 is that such a defense must, in a suit in equity, be set up in an answer, and not by a technical plea."

And, following this practice, Judge COXE, in *Korn vs. Wiebach* (above), says: "It is not the province of a plea to interpose defenses which go to the merits and relate in nowise to matters in abatement or in bar. Such defenses should properly be raised by answer. * * * In the case at bar, where the device is a simple one and the issues are sharply defined and easily understood, it is possible that the question of infringement might be satisfactorily determined in this manner, with a saving of expense to all parties concerned. But a decision once made to this effect will be 'recorded as a precedent' which may be invoked in every action of infringement, and thus tend to unsettle and confuse what is now plain and simple."

II. Or, if the plea is not overruled, it should be *treated as an answer*.

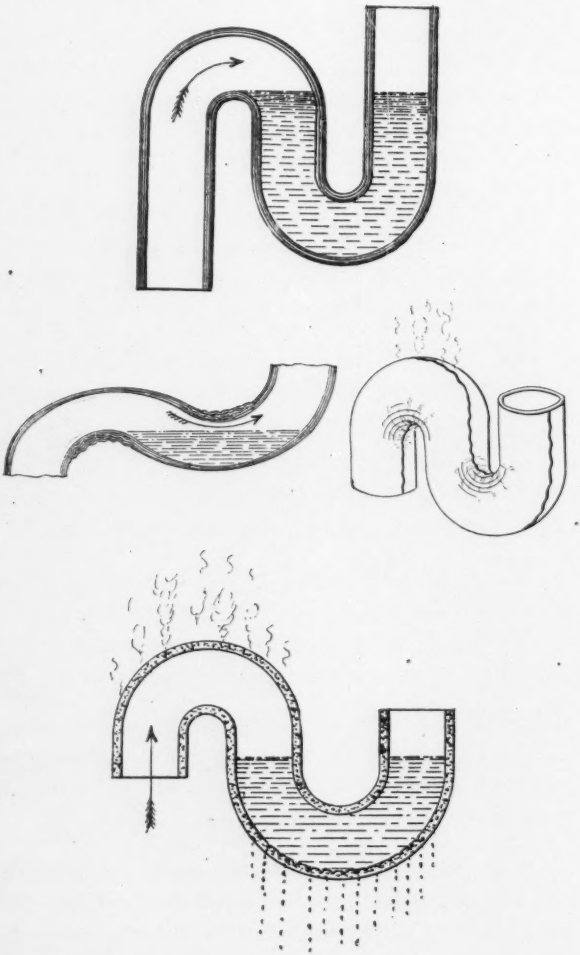
It is *only, if so treated*, that the defenses are entitled to be considered.

In *Reissner vs. Anness* (above) Judge NIXON says: "The proper view in the case is that the plea as filed may be set down as an answer, at the option of defendants."

The plea herein has been treated thus far as an answer.

THIRD POINT. The history of the prior art shows that the structure patented by McCloskey was greatly needed, and was not an obvious mode of remedying recognized difficulties.

(1) *What is a plumber's trap?* It is shaped like an S. Its function is to hold water—to act as a seal to prevent the flow or access of sewer gas which is pressing up a pipe.



In the cuts the shaded portions represent the water which *should* act as a seal and prevent from escape the gas coming up in the direction of the arrow.

This device is very old.

To render it operative for the purpose for which it is used it must be so constructed as to perform *three* essential *functions* or *uses*.

1. It must be shaped so that it retain sufficient water to act as a seal, to prevent the gas rising directly through the pipe.

2. It must be made of material capable of preventing gas escaping through its walls.

3. It must be made of material capable of holding, without leakage, the water forming the seal, and of withstanding the action of chemicals contained in sewage.

If the S curve does not double-bend sufficiently, only a little water will collect in the lower bend, leaving a clear space above it. There will be no seal, no plug, no *trap*. The device will be simply a piece of crooked pipe.

If there should be holes or defective seams in any portion of the structure below the place where the water is held, the rising gas would escape. Again there would be no *trap*. The purpose of the device would be defeated as completely by the escape of gas before it reached the water as by the water failing to stop it. The result would be the same, *i. e.*, there would be no trap if the gas escaped by passing *through pores* or through *holes* in the material.

If the device is not capable of holding water, of course the seal would not set, or would soon be broken. The requirements of a plumber's trap render it necessary that the seal remain entire for quite long periods

of time (for instance, when the house is shut for a summer vacation).

Therefore, a leakage of water from the seal would impair the usefulness and defeat the purpose of the device.

A paper trap would not operate, nor one made from "material corroded by chemicals contained in the water."

(b) How had prior inventors tried to construct plumbers' traps, and what were the defects of their contrivances?

Prior to 1859 no trap ever had been made from a *single* piece of metal. Pieces of metal were formed into the shape of half a trap, split lengthwise. This was accomplished by bending sheet metal over a form. Two of these half traps were then soldered together. The Lowe Patents of 1859, put in evidence by defendant, state the method and defects of this old mode of manufacture. One of them says:

"The present manner of constructing traps is to take "two pieces of sheet lead, bend them over an iron form "or otherwise, and fit them and solder them together, "and as the solder is softer than lead, the trap must "be weaker in the seam than elsewhere; also when "formed the sheet lead is thinner in the bend, the place "where the most strength is required" (Rec. p. 44).

And again:

"In the present mode of manufacturing the seams on "the side where the two pieces are soldered together "frequently part from the acid, eating the tin out of "the solder and weakening it" (Rec., p. 44).

And again:

"In this operation (cleaning) it often occurs that an "inexperienced person will strike the bend below, and "it being thin sheet lead, easily parts and destroys "the trap" (the parenthesis is ours), Rec., p. 47.

Such defects an ordinary plumber would discover

It would not require the learning of a chemist or metallurgist to find an open seam, that the metal was *thinned out* at the bend, that the bore was not the same all through, or that it was so expensive on account of labor and solder that it could not be put into general use.

Lowe's patents show, therefore, clearly that the imperfections and dangers of the old *pieced* and *solder jointed* traps were well known, and the desirability of constructing an S-shaped trap of a single piece of metal without joints, and of uniform thickness of walls throughout, was a *desideratum*.

Yet how did Lowe attempt to solve the problem?

At this time, prior to 1859, cast lead pipe was in general use (Rec., p. 25), and naturally persons skilled in the art of plumbing turned their attention to overcoming the difficulties in the way of building a mold that would *cast* a device of the peculiar shape required for a trap, and this was what Lowe patented in 1859. To produce the shape from a *single* piece of metal was deemed all that could be accomplished. No one appreciated, and would not be apt to discover, that *cast metal would not hold gas* (Rec., pp. 12, 19, 20, 25); nor that *water would percolate through it* (Rec., pp. 12, 13, 14), nor that it was particularly *open to attack by chemicals* contained in sewage (Rec., pp. 19, 20, 21). Such facts are discovered by study and analysis of the natures of the various substances involved.

When, then, in 1859, Lowe obtained his two patents for the process and casting of the peculiar shape required, he perhaps supposed that the desideratum had been obtained—a trap from a single piece of metal.

The peculiar shape *had* been attained, but the *trap* had not yet been constructed.

The expert Parmelee, a practical and analytical chemist (Rec., p. 17), speaks of: "The porosity of cast pipe or cast lead generally for such purposes, *even when not*

manifest at first * * * " (the italics are ours) (Rec., pp. 19, 20).

Is it any wonder then that defendants' witness, a practical plumber, testifies that he did not know how the cast trap was defective (Rec. p. 38, 13 x-Q.).

Lowe knew that solder was not a suitable material for a trap (Rec., pp. 44, 46, 47). He knew that if sheet metal were bent it was " thinned out " at the bend (Rec., p. 44) ; the opening of a seam or the thinning out of the metal is plain enough.

He did not know the chemical nature and formation of cast metal. The defects of a trap made therefrom are not such as would be perceived by one skilled in the plumber's art. He of course knew that if his trap allowed the gas to escape through its walls its object was defeated. But if it did, how could he remedy this vital defect ?

The most harmful of all these gases is odorless.

He knew, too, that if the seal of water were broken the gas would escape up the pipe ; but how could he tell that the water percolated through the cast metal and that the chemicals attacked it ? The water might evaporate as rapidly as it came to the surface. The pores are not visible to the eye. The art of plumbing does not embrace the knowledge that chemicals will attack more actively an element when its structure is crystalline than when it is fibrous.

It took twenty years before any one suggested another structure which would remedy the defects *both* of the *seamed* sheet lead trap *and* of the single piece *cast* lead trap.

In 1879 the patentee, John McCloskey, produced and patented an S trap made of a single piece of *die-drawn metal of uniform thickness and uniform bore throughout.*

The question before us is : In view of the state of the art, is a die-drawn seamless trap an article of manufacture having new *uses* and *properties ?*

The state of the art reveals :

I. The bent sheet metal *pieced* and *soldered* trap;

II. The Lowe *cast* trap; and

III. The die-drawn seamless *straight* pipe of soft metal.

The superiority of die-drawn soft metal over cast metal was in a general way recognized; and, perhaps, it may have occured to some one that it would be desirable to substitute it for cast metal in the manufacture of traps. If so, how could this substitution be made without again encountering the old difficulties of jointing and soldering, involved in putting separate pieces together, or those of breaking *the pipe by bending a single piece into the S form?*

It is a valueless suggestion to attempt the forming of an S-shaped trap by bending a straight die-drawn lead pipe into the required shape. This is impossible. Such an attempt would result in nothing which would have the properties or the uses of a trap. The evidence is conclusive that there is no way known by which *straight* pipe can be converted into a trap because *it cannot be bent into the proper shape* (Rec., p. 16, Q. 12; pp. 21, 22, Qs. 7, 8, 9; pp. 26, 27, Qs. 4, 5).

We ask the Court whether it is obvious how this problem could be solved, before showing how McCloskey solved it?

FOURTH POINT. The patent in suit describes and claims a new invention.

(a) The invention of McCloskey is for an article of manufacture when made by and having the qualities resulting form a particular process of manufacture.

Smith vs. Goodyear Dental Vulcanite Co., 93 U. S., 486.

Goodyear Dental Vulcanite Co. vs. Davis, 102 U. S., 224.

If such be the case the invention is a patentable one.

In *Smith vs. Goodyear Dental Vulcanite Co. (supra)* this Court said: "The invention, then, is a *product* or manufacture *made in a defined manner*. It is not a product alone separated from the process by which it is created. The claim refers in terms to the antecedent description, without which it cannot be understood. The process detailed is thereby made as much a part of the invention as are the materials of which the product is composed." And again: "We cannot resist the conviction that devising and framing such a manufacture *by such a process* and of such material was invention." (The italics are ours.)

In *Goodyear Dental Vulcanite Co. vs. Davis (supra)* this Court quoted and reiterated the decision in the *Smith* case.

The patentee in the present case has been very careful not to *separate the process* from *the product*. He expressly says that the drawn seamless trap of soft metal which he claims is one which results from the process *of causing soft metal to issue with variable velocities or in variable quantities at opposite sides of an annular die.*

The first words of description are: "The said invention comprises, as a new article of manufacture, a *die-drawn seamless soft metal trap* (the product), the same being the trap *resulting from* the practice of the means and methods herein specified as embraced in my

invention, the practice of the process of *causing soft metal to issue with variable velocities or in variable quantities at opposite sides of an annular die*" (the process). (The italics and parentheses are ours. Rec., p. 30.) He then disclaims in this patent the particular *apparatus* for producing the articles resulting from the practice of that process (Rec., p. 30).

To separate *a* particular apparatus for carrying out a process certainly does not wholly eliminate the process which is expressly retained.

The claim is in the following words: "A die-drawn seamless trap of soft metal as a new article of manufacture *substantially as herein described.*"

If a person produces a die-drawn seamless trap of soft metal by bending or in any other way than by causing soft metal to issue with variable velocities or in variable quantities at opposite sides of an annular die, clearly he does not embody the invention. He does not make the trap "substantially as described."

In *Goodyear vs. Davis* the Court said: "Both the *material* of which the dental plate is made, or its equivalent, and the *process* of constructing the plate, or a process equivalent thereto, must be employed." (The italics are ours.)

(b) The McClosky trap had new qualities as compared with anything that preceded it.

It is of a single piece of metal die-drawn, seamless, without solder, inexpensive (Rec. pp. 33, 34, 44, 46, 47). Also it is curved in form, and, *nevertheless,* of uniform bore and thickness. These are, *in combination,* new properties (Rec., p. 16, Qs., 12, 13, 14; p. 21 Q. 8; pp. 26, 27, Qs., 4, 5; pp. 34, 44).

It is true that the Lowe cast trap was of a single piece of metal, seamless, without solder, and less expensive *than* the *soldered* trap, and was of the required shape, both in having the proper double bend and a uniform

bore and thickness (Rec., pp. 42, 43, 44, 45, 46, 47). But it possessed these *only* by being made of material *which was otherwise incapable of making an effective trap.* But the McClosky trap has not only all these qualities, but it has them without the disadvantages of the only material which has previously combined them, and it has additional qualities. It is a die-drawn soft metal trap, while the other is cast metal. All the properties of die-drawn metal not possessed by cast metal are *new properties in the trap* in suit, as compared with the Lowe trap, and these properties *are for the first time embodied in an S-shaped pipe by means of the peculiar method of manufacture.*

The trap in suit is also very much less expensive than the Lowe trap. On this point the Examiners-in-chief, in granting the patent, said: "This is not due merely to the cheapness, though that alone distances competition" (Rec., p. 33).

Almost the entire evidence on behalf of complainant is the testimony of expert chemists and metallurgists, and is uncontradicted.

The chemical nature and formation of die-drawn and cast metal are entirely different.

They show that the Lowe cast trap cannot prevent gas escaping through its walls, and cannot hold the seal intact because water percolates through it and sewage corrodes it.

"The water sweated through the walls of the cast trap, as I have just mentioned, and then ran together in drops, which united and flowed away in a small stream. A trap as porous as this would permit the passage of noxious gases through the pores of its walls, under ordinary atmospheric pressure, without difficulty" (Rec., p. 12). "The porosity of cast pipe or cast lead generally for such purposes, even where not manifest at first, is operated upon by the gases penetrating the pores and setting up chemical action which corrodes the material and permits the passage

of gases which are offensive and unhealthy" (Rec., pp. 19, 20).

"Cast lead traps, being porous in their character as compared with traps made of compressed and drawn lead, are readily attacked by corrosive liquids which come in contact with the inner surfaces of the traps, and are also, because of their porosity, far more likely to permit the escape of gas through their porous walls than is the case with wrought lead traps" (Rec., p. 20).

"My recollection is that the action of the chemicals on the cast lead was about twenty per cent. more rapid than upon the wrought lead" (Rec., p. 21).

"I am convinced, from my own experience, that the cast trap is so porous as to permit injurious gases to filter through the walls, and, in my opinion, the loose texture of the cast lead permits it to rot, for the reason that the air and gases soak, so to speak, through its substance" (Rec., p. 25).

Of the functions, then, essential to the operation of a trap, the Lowe trap possesses only the proper shape.

"Cast seamless traps have the curves or bends *essential* to constitute a trap, but not the structural properties of drawn or wrought lead *necessary* to a perfect trap" (the italics are ours) (Rec., p. 26).

It *appeared* to be operative as a trap, but actually it was not.

The McCloskey trap does therefore subserve uses which are new as compared with any effectually accomplished by the Lowe trap, and also has other advantages. It also breaks, if at all, regularly (Rec., pp. 14, 20); will solder more readily (Rec., pp. 14, 26); has greater strength (Rec., pp. 15, 18, 20); is more easily manipulated and fitted (Rec., pp. 20, 25).

The Lowe trap had the requisite *peculiar shape.*

The soldered trap lacked even this, because it was not of uniform bore or thickness and was also pieced and soldered.

Die-drawn pipe, having its peculiar properties, was

old. But the trap in suit is the first contrivance *embracing all the essential properties and functions of a trap*, which has not only the proper shape, but is also gas tight, water tight, uniform in thickness, easy to make and of a structure which effectually resists chemical action tending to destroy it.

One of the witnesses sums the matter up as follows:

"The great value of the die-drawn seamless trap of "lead is that it unites the shape which is necessary to "the plumber's trap with those properties of wrought "lead which had previously been known in straight lead "pipe. These properties of shape and of the character "of wrought lead were never included together in one "device until the die-drawn seamless trap of soft metal "was contrived. It is this conjunction of qualities "which had always been separate from each other, and "never brought together in one device, that makes the "die-drawn seamless trap a most valuable article in the "trade. I can explain these differences further.

"Cast lead pipe has neither the structural properties "of drawn or wrought lead nor the curves or bends "essential to constitute a trap.

"Drawn lead pipe has the structural properties of "drawn or wrought lead, but not the curves or bends "essential to constitute a trap."

"Cast seamless traps have the curves or bends "essential to construct a trap, but not the structural "properties of drawn or wrought lead necessary to a "perfect trap.

"Die-drawn seamless traps, however, combine both "the structural properties of drawn or wrought lead (like "drawn lead pipe) and the curves or bends (like the cast "trap) essential to constitute a perfect trap. Before the "die-drawn trap the properties of a trap and the prop-"erties of a drawn lead pipe had never been provided in "one and the same thing" (Rec., p. 26).

It cannot avail to argue that the Lowe cast trap has

some of the properties of the trap in suit, die-drawn *straight* pipe has *others*; therefore the trap in suit has no new properties. If a contrivance is not new because its several *parts* are old, very few patents could be sustained.

Similar combined advantages sustained the patent in *Smith vs. Goodyear Co.* (*supra*).

(c) Again, it cannot be said *the patent in suit is for an article of manufacture whose novelty consists in a* MERE *change of materials.*

The substitution of die-drawn seamless metal for cast metal enables the device to perform its appropriate functions in a new, improved and highly useful way, and enables it to perform functions efficiently, which the old structure of old materials could not perform. The old structure, failed to perform one or more of the *essential* functions of the device.

Cantrell vs. Mellick, 117 U. S., 689.

The trap was an absolutely new thing. Never before was curved wrought metal made having a uniform thickness.

The patentee of the patent in suit discovered how to produce it, and describes his process in his specifications. The metal or pipe is *formed curved.* It is not formed straight and then bent. It is a new material for traps, not simply a new shape; and the adoption of the new material was only rendered possible by the invention of a peculiar mode of producing the new article.

Straight pipe could not be made into the curved traps, and, on the other hand, as one of the witnesses says: "It is equally clear to me that the die-drawn seamless trap cannot be converted into a piece of straight lead pipe that would be good for anything" (Rec., p. 21).

Clearly, then, the substitution of the new material involved invention, as was said by this Court in the Dental Vulcanite Co. case: "If such a substitution involves a *new mode of construction*, or develops *new uses* and *properties* of the article formed, it may amount to invention. The substitution may be something more than formal. It may require contrivance, in which case the mode of making it would be patented" *(the italics are ours).*

(d). There is invention disclosed in the patent in suit beyond what was necessary to construct the apparatus.

The one remaining ground upon which Judge WHEELER refused to admit the evidence on the second hearing was that there was no invention dependent on the process of making separate from the apparatus. In this connection he used the following language: "A patent for leaden pipe would not be good, as it would be for an effect, and would consequently prohibit all other persons from using the same article, *however manufactured*" *(the italics are ours).* Clearly, the Judge did not comprehend those parts of the specification which describe the invention as being a product manufactured by a *particular* process. The patent does not cover die-drawn seamless traps of soft metal, *however manufactured*, but only when manufactured by a *particular* process, as shown above.

The patentee discovered that a new article of manufacture could be produced by "causing soft metal to issue in variable quantities from opposite sides of a die." This is separate and distinct from the invention of an apparatus or machine for carrying out this process.

But it is quite clear that Judge WHEELER did not recognize the discovery by the inventor of the process of "causing soft metal to issue in variable quantities." If he had recognized the discovery of the process his decision must have been different, for he said:

"A patent may be valid for a process and another be valid for the means of carrying it out;"

Phillips vs. Kochert, 31 Fed. Rep., 39.

See also cases above cited.

FIFTH POINT. The judgment appealed from should be reversed and the prayer of the complainant's bill granted.

FREDERIC H. BETTS,
Counsel for Appellant.

Office Supreme Court U. S.
FILED.
MAR 31 1891
A. S. H. McKENNEY,
Clerk.

Supreme Court of the U. S.

October Term, 1890.

SAMUEL W. FOWLER,
Appellant,
vs.
ROBERT HAMIL.
No. 4.

2

Brief for Robert Hamil, Appellee on the above appeal.—Statement.

The infringement charged against the appellee was the use by him, as a mechanical plumber, of a Die-Drawn Seamless Trap, at Greenburg, in the State of New York, on the 21st of October, 1879 (Rec. P. 4). This use by the appellee was in the course of repairs to a house then occupied by James A. Whitney, Esq., the former Solicitor for the complainant; the appellee then believed that the sole object of this infringement suit against him, was for the purpose of affecting the appellee's action against said Whitney for services rendered, and material furnished, then pending in the Supreme Court of the State of New York, for Westchester Co.

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In consequence of this belief, the appellee's sole object in defending this suit was to avoid litigation with the least possible expense, and hence interpose the plea herein and prosecute

his defense thereunder, resting entirely upon the decisions of the Circuit Court below, in the case of McClosky *vs.* Du Bois, originally decided April 28th, 1881, and again decided upon a rehearing later in the same term.

POINT FIRST. In answer to the defendant's second point, it seems to us that the fact that the complainant replied, and failed to raise that question in the court below, is a sufficient answer on the part of the appellee.

POINT SECOND. The appellee contents himself with submitting the decisions of Mr. Justice Wheeler in the court below, in the former suits of McClosky *vs.* Du Bois, which involve the same patent.

U. S. CIRCUIT COURT—SOUTHERN DISTRICT OF NEW YORK.

McCLOSKEY *v.* DU BOIS *et al.*

Decided April 28, 1881.

WHEELER, J.:

"This case rests upon Letters Patent No. 220,767, issued to the orator, and purporting to be for an improvement in soft-metal traps. Several questions arise upon the defenses made, and among them one upon the patent itself as to whether it covers any patentable invention or any invention at all.

The specification states:

> The object of this invention is to provide what are commonly termed, 'Plumbers' Traps,' which are ordinarily made of lead of a quality superior to those made before the date of my invention and at much less expense.

> The said invention comprises, as a new article of manufacture, a die-drawn seamless soft-metal trap, the same being the trap resulting from the practice of the means and methods herein specified as embraced in my invention—the practice of the process of causing soft-metal to issue with variable velocities or in variable quantities at opposite sides of an annular die. 9

Then what the figures accompanying are, one being a sectional, and another a side, view of the traps, and the rest views of apparatus to make them; and then that—

> My said invention may be manufactured by any suitable process, means, or apparatus, whereby soft metal may be caused to pass in variable quantities or at variable velocities through or from an annular die. 10

And then describes the apparatus constituting one means by which the trap may be produced and the mode of production, stating further that the 'walls of the trap * * * thus formed will be of uniform thickness at the inner and outer sides of the bends or curves,' and that it issues from the die 'in the form of a pipe of greater or less curvature and with solid or seamless walls, the outer surfaces of which are more or less marked with longitudinal striations from end to end of the trap, which latter is thus distinguished from other traps by its peculiar appearance.' 11

The claim is for—

> A die-drawn seamless trap of soft metal, as a new article of manufacture, substantially as herein described.

There is nothing further in the patent showing what traps of this sort were in use or known before or any other advantages of this trap. Neither is there anything in the evidence or case on the record showing anything wherein a die-drawn trap is any different from or better than other traps. These traps are simply bends of water-pipes downward and then upward far enough to hold sufficient water in the bends to fill the bore of the pipes at the lowest point and prevent the passage of air or gas. It is a part 12

13 of common knowledge that such traps were made prior to this patent or invention of lead, and perhaps of other soft metal, by moulding or casting. Traps so made were in very common use in the drainage of houses in cities. This common knowledge and use courts take judicial notice of in cases of this kind. (*Brown* v. *Piper*, 91 U. S., 37; *Terhune* v. *Phillips*, 99 U. S., 592; *Quirile* v. *Ardito*, 17 Blatchf., 400.)

It was the duty of the orator to point out in his specification the improvement which he claimed to be his
14 invention. (Rev. Stats., sec. 4888.) He had the right to assume, the same as others had, that notice would be taken of this common knowledge; but he was bound to show what there was beyond that which he claimed to be his. With this burden upon him he cannot justly claim that there are differences or advantages in favor of his, which should be presumed to exist, beyond what he has specified. The patent must be taken as it reads in the light of common knowledge until it is shown to cover more by
15 those who claim it does cover more.

Looking at the old and well-known structure and the patent at the same time—and there is nothing different between the old and the new, except that the old is cast or molded and the new is drawn through a die —they are to be made of the same material and are to operate for the same purpose in precisely the same way. The new are said to be of uniform thickness about the bends, but so are the old. The new are said to be seamless, but the old are solid at the juncture of the molds. The new are said to be marked
16 with 'longitudinal striations,' but these have nothing whatever to do with the quality or operation of the trap. They are merely the inevitable marks of the die. They are said to distinguish in appearance the new from the old; but that would only be the subject of a design patent, if of any. The only difference there can be in reality is that one is cast and the other is drawn. If there is any substantial difference between lead or other suitable metal when cast and

when wrought or drawn well enough known to be the 17
subject of judicial notice the court should doubtless regard that difference. There is a well-known difference between cast-iron and wrought-iron; but this is not because casting makes the difference. Only iron of the quality of cast-iron can be cast. It is not so or is not commonly known to be so of lead or other suitable soft metals. They may be either molded or wrought or drawn of the same quality, and are apparently of the same quality when done. These old and new traps are therefore alike in the sense of the pat- 18
ent law. They are of the same material and accomplish the same result in the way. The sole difference is that in appearance between the bark like surface of one and the striated surface of the other. There is nothing between the two to be invented, and the patent covers no invention. (*Wood Paper Patent*, 23 Wall., 562.) However meritorious an invention of the means for making a drawn trap might be, this patent, which, while it describes means is for the product only, has nothing to rest upon.

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The bill is dismissed, with costs.

Mr. James A. Whitney for the plaintiff.
Mr. Peter Van Antwerp and *Mr. Rodney Mason* for the defendants."

McCloskey *v.* Du Bois,

Decided April Term, 1881:

Wheeler, J.: 20

"This cause has been heard since a decretal order for dismissing the bill of complaint and before decree signed upon a motion of the plaintiff to reopen the case for the introduction of new evidence as to the novelty and utility of the patented trap. It is plain that the motion should not be granted unless the new evidence would vary the case and probably lead to a different result.

21 The patent is simply for a die-drawn seamless soft-metal plumber's trap made by forcing the metal through dies at varying velocities on opposite sides. It describes nothing to distinguish these traps from others except the mode of manufacture and longitudinal striations appearing upon them, which are merely the result of the manufacture, and have nothing to do with the quality or operation of the traps. The patent assumed that soft-metal traps were before known and in use, and, besides, that fact was a matter of common knowledge, of which the court took judicial
22 notice. There was no evidence as to the quality and characteristics of the die-drawn traps as compared with the cast traps before most in use. The new evidence would tend to show that their walls have greater solidity and more perfect uniformity, and that they are more elastic, and that the quality of the metal is changed and improved by the process of drawing, and that they have largely superseded all others in use. All these differences are due to the process of manufacture in forcing the metal through dies, all
23 of which effects were before well known. They are the same as the differences between cast and drawn lead pipe, as was shown in *Leroy* v. *Tatham* (14 How., 156). There the testimony was that the drawn lead pipe 'was superior in quality and strength, capable of resisting much greater pressure, and more free from defects than any pipe before made; that in all the modes of making lead pipe previously known and in use it could be made only in short pieces, but that by this improved mode it could be made of any required length and also of any required size, and that the in-
24 troduction of lead pipe made in the mode described had superseded the use of that made by any of the modes before in use, and that it was also furnished at a less price.'

Still the court said, through Mr. Justice McLean:

'A patent for leaden pipes would not be good, as it would be for an effect, and would consequently prohibit all other persons from using the same article, however manufactured. Leaden pipes

are the same, the metal being in no respect different. Any 25
difference in form and strength must arise from the mode of manufacturing the pipes. The new property in the metal claimed to have been discovered by the patentees belongs to the process of manufacture, and not to the thing made.'

And in *Collar Company* v. *Van Deusen*, (23 Wall, 530) Mr. Justice Clifford said:

'Articles of manufacture may be new in the commercial sense when they are not in the sense of the patent law. New articles of commerce are not patentable as new manufactures unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary 26
to construct the apparatus for its manufacture or production.'

The plaintiff did not discover that soft-metal could be wrought through dies, nor that the quality of wrought soft-metal is generally superior to that which is merely cast, and does not pretend that he did; and his patent is not for any such discovery, nor for the application of it. He constructed a machine by which crooked pipe could be made of soft-metal the same as straight pipe had before been made, and the crooked pipe could be cut off so as to constitute traps. His 27
patent is for the traps made in that way, for the effect merely of that machine. He has not the discovery of any principle, even such as Tatham had in the working of soft-metal to support his patent as the minority of the Court in *Le Roy* v *Tatham* thought Tatham had to support his patent.

This newly-offered evidence of the differences in quality between the drawn traps and cast traps shows merely the differences between drawn pipe and cast pipe or wrought lead and cast lead, and could not affect the decision of the case at all in the view taken of it by 28
the court. If this construction of the patent and view of the case are wrong, they can be corrected by appeal.

The motion must be denied.

Mr. James A. Whitney for the complainant.

Mr. Peter Van Antwerp and *Mr. Rodney Mason* for the defendant."

29 POINT THIRD. The appellee therefore submits that the judgment of the Circuit Court below should be affirmed with costs.

Dated New York, March 27th, 1891.

HOWARD A. SPERRY,
Solicitor for the Appellee
and of Counsel.

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Office Supreme Court, U. S.
FILED,
MAR 21 1891
JAMES H. McKENNEY,
CLERK.

U. S. Supreme Court.

FLORENCE S. FOWLER,
Adm'r, etc.
vs.
ROBERT HAMILL.

AFFIDAVIT OF DEFENDANT'S SOLICITOR IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE.

HOWARD A. SPERRY,
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Solicitor for Deft.

U. S. Supreme Court.

FOWLER, Adm'r, vs. HAMILL.	No. 4 Calendar, 1890. October Term.

Southern District of New York, ss. :

HOWARD A. SPERRY on oath says: That he is the solicitor of defendant, and has been since the beginning of this suit.

That a motion for leave to intervene was made by the same person who now moves, through his same counsel in the Circuit Court, before the trial of this action, which motion was after a full hearing denied, and to the papers used on, and the decision of that motion, deponent begs leave to refer in support of this affidavit, especially in contradiction of the alleged offers to defend for defendant; certified copies of same being herewith submitted.

That thereafter a trial was had before Mr. Justice Shipman, holding the Equity Term of the U. S. Circuit Court, at New York, the complainant being represented by Messrs. Wm. J. Underwood and James C. Cloyd, as counsel, and the defendant, by deponent, which trial resulted in the dismissal of the plaintiff's bill; and was based upon the former decisions in favor of the party making this motion, who was therein represented by the solicitor now appearing for him; and that successful issue of this suit is a sufficient answer to all the charges of collusion ever made herein; al-

Court of the United States for the Southern District of New York.

3d. Because the proceedings under which the title of the appellants is based were *coram non judice* and void."

I.

(*a.*) The affidavits and proofs before the Court submitted by the appellant completely and effectually answer all the allegations of collusion which are submitted in the moving papers of Dubois, although the said allegations of collusion are founded solely and wholly upon information and belief, and no sources of information or grounds of belief are supplied.

(*b.*) A similar motion founded upon substantially the same allegations was made by the same party, Dubois, in February, 1882, in the Circuit Court of the United States for the Southern District of New York, and said motion was fully argued before the Hon. Samuel Blatchford, then Judge of the said Circuit Court, and was by him denied March 11, 1882.

(*c.*) The counsel for Dubois in open Court on the 16th day of March, 1891, upon the return of his notice of this motion publicly and emphatically withdrew all the charges of collusion and abandoned that as a ground upon which to intervene and take testimony on this appeal.

II.

The appeal in this case was allowed June 16, 1885, by Hon. Hoyt H. Wheeler, sitting as Circuit Judge in the Southern District of New York, upon the petition of the solicitor for the appellant, which recited all the proceedings prior to the decision of the cause, " and that on the 21st day of April, 1883, " a decree was made in said suit and duly entered, " whereby it was ordered, adjudged and decreed, that " said bill of complaint be dismissed, and that said Mc-"Closkey pay to the above named respondent the costs " of said suit to be taxed, and thereupon the said " costs were taxed, and on the 16th day of June, " 1883, the final decree was entered in said cause, in-" cluding judgment for the amount of said costs as " taxed " (page 53 of Printed Record).

We submit that under such circumstances the appeal having been allowed by a careful and conscientious Justice of the Circuit Court and having been pending for nearly six years the Supreme Court should not allow a stranger to the record either under the claim of interest or as *amicus curiæ* " to intervene and to show by the testimony to be taken under the order of the Court," that the allowance of this appeal upon all the facts essential to its allowance was erroneous.

Upon the question as to whether or not under the facts the appeal was taken in season it is to be assumed that counsel for the parties to the record will be fully prepared upon the hearing of the appeal to discuss it.

III.

The title of the appellant is founded upon the decree of the Circuit Court of the United States for

the Southern District of New York entered by the direction of Hon. Wm. J. Wallace, Circuit Judge, and said decree has remained unreversed, unmodified and in full force and effect since the entry thereof, December 3, 1884 (page 51 of Printed Record).

It is hardly to be conceived that this Court at the instance of this stranger will permit him or his counsel in any character to "intervene and to show by testimony to be taken under the order of the Court" that this decree of Judge Wallace was erroneous upon the allegation that he had no jurisdiction of the cause.

On neither or all of the grounds upon which the motion is founded should this stranger to the record be allowed to intervene to avert the argument of this appeal.

The good faith of the application may be tested by the presentation of so serious a charge as that of collusion, and its abandonment upon the first occason that an opportunity is afforded to the persons charged to be heard in opposition thereto.

Respectfully submitted,

FRANK J. DUPIGNAC,
WILLIAM S. BEAMAN,
Of Counsel.

139-53

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 229.

THE INLAND AND SEABOARD COASTING COMPANY AND HENRY A. WILLARD, JOHN W. THOMPSON, SAMUEL NORMENT, AND J. H. BAXTER, PLAINTIFFS IN ERROR,

vs.

FRANCIS A. TOLSON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 14, 1887.

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OCTOBER TERM, 1890.

No. 229.

THE INLAND AND SEABOARD COASTING COMPANY AND HENRY A. WILLARD, JOHN W. THOMPSON, SAMUEL NORMENT, AND J. H. BAXTER, PLAINTIFFS IN ERROR,

vs.

FRANCIS A. TOLSON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Declaration	1	1
Summons	5	2
Marshal's return	6	3
Plea	6	3
Joinder in issue	6	3
Note of issue	7	3
Order calling jury	8	4
Order continuing trial	9	4
Order discharging jury and continuing case	10	4
Order calling jury	11	5
Orders continuing trial	12	5
Verdict and judgment	15	6
Motion for new trial on exceptions	16	7
Motion for new trial because evidence insufficient, &c.	16	7
Motion for new trial because verdict is contrary to evidence, &c.	17	7
Order overruling motion for new trial	18	8
Appeals from orders denying new trial	18	8
Bond on appeal to general term	20	9
Order extending time to file bill of exceptions	22	9
Order allowing bill of exceptions	22	10

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	Original.	Print.
Bill of exceptions	24	10
Testimony of Frank A. Tolson	25	10
Statement of further testimony for plaintiff	87	44
Testimony of Mrs. Toyer	88	45
Maria Small	89	46
Henry H. Hanie	89	46
Thomas Ross	96	49
Statement of further testimony for plaintiff	101	52
Statement of testimony for defendant	102	52
Testimony of Capt. Gibbon, U. S. A.	104	54
Henry J. Ennis	106	55
Alfred Richards	107	55
Statement of further testimony for defendant	135	69
Statement of the officers of the "Thompson"	136	69
Testimony of Columbus D. Bonneville	138	71
J. Beecham	144	73
Henry H. Hanie	145	74
Statement of testimony for plaintiff in rebuttal	147	75
Plaintiffs' requests	148	76
Defendant's requests	151	77
Statement as prayers granted	154	79
Charge to jury	156	79
Exceptions to instructions	165	84
Judgment in general term	176	88
Bond	178	88
Writ of error	179	89
Citation	179	90
Certificate to record	180	90

1 In the Supreme Court of the District of Columbia.

Declaration. Filed Mar. 11, 1884.

FRANCIS A. TOLSON, Plaintiff,
vs.
THE INLAND AND SEABOARD COASTING COMPANY OF THE DISTRICT OF COLUMBIA, Defendant.
At Law.
No. 25170.

The plaintiff sues the defendant, a body corporate under the laws of the United States, having its habitat in the District of Columbia, for that whereas the said defendant heretofore, to wit, on the 15th day of September, 1883, was possessed of a certain steamboat named and called, to wit, John W. Thompson, which said steamboat was used by the defendant for the transportation of freight and passengers on the Potomac river from and to the city of Washington, in the District of Columbia, and from and to divers other points and landing places in the States of Maryland and Virginia contiguous to the said river, which said steamboat was on the day afore-
2 said under the care, government, and direction of certain servants of the defendant, who were then and there navigating the said steamboat in and upon the said river and opposite to King George county, in the State of Virginia.

And the said plaintiff was also on the day aforesaid possessed of a certain pier or wharf situate in the said Potomac river, distant from the Virginia bank thereof, to wit, 250 yards, and opposite the said county of King George, in the said State of Virginia, and the said plaintiff on the day aforesaid was lawfully standing upon his said pier or wharf.

Nevertheless the said plaintiff says that *he* the said defendant, by its servants aforesaid, so negligently, carelessly, and improperly navigated, steered, governed, and directed the said steamboat that by and through the mere negligence, carelessness, and improper conduct of the said defendant, by its said servants in that behalf, the said steamboat then and there ran and struck with great violence and force upon and against the said pier or wharf of the plaintiff, and thereby greatly broke and damaged the same, and
3 thereby also he, the said plaintiff, was then and there cast and thrown with great violence against and upon one of the capstans or piles of the said pier or wharf, and his, said plaintiff's, left foot was thrown between one of the piles of the said pier or wharf and other timbers thereof, and was then and there greatly cut and bruised, and the bones thereof were crushed and broken.

And plaintiff says that by means of the premises aforesaid he was then and there greatly hurt and wounded, and became and was and yet is sick, sore, lame, and disordered, and in consequence only of the said injuries the plaintiff was forced to suffer amputation of three of the toes of his said left foot, and plaintiff says that from the time of receiving said injuries to the present day he has suffered great pain therefrom and has been hindered and prevented from perform-

ing and transacting his lawful affairs and business by him during that time to be done and transacted.

And also by means of the premises he, the said plaintiff, was
4 forced and ob- to pay, lay out, and expend, and hath necessarily paid, laid out, and expended, divers sums of money, to wit, five hundred dollars in all, in and about endeavoring to be healed and cured of his said wounds, hurts, and bruises occasioned aforesaid.

And also by means of the premises he, the said plaintiff, has paid, laid out, and expended divers large sums of money, amounting in all, to wit, fifty dollars, in and about the repairing of the said pier or wharf so damaged as aforesaid.

And plaintiff says that by reason of the said grievances and premises he has been greatly damaged, to wit, twenty thousand dollars; wherefore he brings his suit.

And plaintiff claims twenty thousand dollars, besides costs.

BIRNEY & BIRNEY,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise, judgment.

BIRNEY & BIRNEY,
Attorneys for Plaintiff, 456 *Louisiana Ave.*

5 *Summons. Issued March* 11, 1884.

In the Supreme Court of the District of Columbia, the 11th Day of March, 1884.

FRANCIS A. TOLSON, Plaintiff, *vs.* THE INLAND AND SEABOARD COASTING COMPANY OF THE DISTRICT OF COLUMBIA, Defendant.	At Law. No. 25170.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term occurring 20 days after service of this writ on you to answer the plaintiff's suit and show cause why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

BIRNEY & BIRNEY, *Attorneys.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

6 *Marshal's Return.*

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant by service on John W. Thompson, pres't of said company, the 12th day of March, 1884.

CLAYTON McMICHAEL, *Marshal.*

Plea of the Defendant. Filed April 1, 1884.

In the Supreme Court of the District of Columbia.

FRANCIS A. TOLSON
vs.
THE INLAND & SEABOARD COASTING COMPANY. } At Law. No. 25170.

The defendant says it is not guilty as alleged.

NATH'L WILSON,
Attorney for Defendant.

Joinder in Issue. Filed April 2, 1884.

In the Supreme Court of the District of Columbia.

7 FRANCIS A. TOLSON
vs.
INLAND & SEABOARD COASTING COMPANY. } No. 25170. At Law.

The plaintiff joins issue with the defendant upon its plea.

BIRNEY & BIRNEY,
Attorneys for Plaintiff.

Note of Issue. Filed April 2, 1884.

In the Supreme Court of the District of Columbia.

FRANCIS A. TOLSON
vs.
THE INLAND & SEABOARD COASTING COMPANY. } No. 25170, Law.

The cleark will please calendar this cause for trial.
Pla-ntiffs' att'ys, Birney & Birney.
Def't's att'y, N. Wilson.
Last pleading filed April 2, 1884.

BIRNEY & BIRNEY,
Att'ys for Pl'ff.

Proceedings before the supreme court of the District of Columbia, holding a special term at law and circuit court in and for said District, and designated, by order passed in general term September 25th, A. D. 1885, as division No. 1, commencing on the third Monday, it being the nineteenth day, of October, A. D. 1885.

MONDAY, *October 19th, A. D.* 1885.

By order of Walter S. Cox, one of the justices of said court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

THURSDAY, *January 7th, A. D.* 1886.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

FRANK A. TOLSON, Pl'ff,
vs.
THE INLAND & SEABOARD COASTING COMPANY, Def't. } At Law. No. 25170. Cal., 375.

9 Now comes here as well the plaintiff, by his attorneys, Messrs. Birney & Birney, as the defendant, by its attorney, Mr. Wilson, and a jury of good and lawful men of this district, to wit, John H. Shelton, Anthony Gaegler, George A. Birch, Alfred C. Newman, Elisha P. Taylor, Daniel Smith, Lawrence Hickey, Jasper M. Jackson, Theodore C. Barber, John W. Dyer, William R. Keyworth, and Stephen L. Kerney, who, being duly sworn to try the issue above joined, are respited until the meeting of the court to-morrow morning.

FRIDAY, *January 8th, A. D.* 1886.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

FRANK A. TOLSON, Pl't'ff,
vs.
THE INLAND & SEABOARD COASTING COMPANY *Co.*, Def't. } At Law. No. 25170. Cal., 375.

10 Now again come here the parties aforesaid in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

SATURDAY, *January 9th, A. D.* 1886.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

FRANCIS A. TOLSON, Pl'ff,
vs.
THE INLAND & SEABOARD COASTING CO., Def't.
At Law. No. 25170. Cal., 375.

Now again comes here the parties aforesaid in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they cannot agree upon a verdict; whereupon they are discharged from further considering the case, and the case is continued.

11 Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, it being the 18th day, of October, A. D. 1886.

MONDAY, *October* 18*th*, *A. D.* 1886.

By order of the Hon. Alexander B. Hagner, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

WEDNESDAY, *December* 1*st*, *A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

FRANCIS A. TOLSON, Pl'ff,
vs.
INLAND AND SEABOARD COASTING COMPANY, Def't.
At Law. No. 25170. Cal., 93.

Now comes here as well the plaintiff, by his attorneys,
12 Messrs. Birney & Birney, as the defendant, by its attorney, Mr. Wilson, and a jury of good and lawful men of this District, to wit, Joseph H. Helton, Levi Curry, Samuel Tinney, Samuel Brown, James H. Bryum, Owen O'Hare, Charles G. Heitmuller, Daniel T. Donohue, William R. Curtin, Thomas J. Naylor, Joseph C. Lee, and George W. Wise, who, being duly sworn to try the issue above joined, are respited until the meeting of the court to-morrow morning.

THURSDAY, *December* 2*d*, *A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

FRANCIS A. TOLSON, Pl'ff,
vs.
INLAND AND SEABOARD COASTING COMPANY, Def't.
At Law. No. 25170. Cal., 93.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after
13 a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

FRIDAY, *December 3d, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

FRANCIS A. TOLSON, Pl'ff,
vs.
INLAND AND SEABOARD COASTING CO., Def't. } At Law. No. 25170. Cal., 93.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court on Monday morning next.

MONDAY, *December 6th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

14 FRANCIS A. TOLSON, Pl'ff,
vs.
INLAND AND SEABOARD COASTING COMPANY, Def't. } At Law. No. 25170. Cal., 93.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited on Friday last, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

TUESDAY, *December 7th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

FRANCIS A. TOLSON, Pl't'ff,
vs.
INLAND & SEABOARD COASTING COMPANY, Def't. } At Law. No. 25170. Cal., 93.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

15 WEDNESDAY, *December 8th, A. D.* 1886

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

FRANCIS A. TOLSON, Pl'ff,
vs.
INLAND AND SEABOARD COASTING CO., Def't. } At Law. No. 25170.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find said issue in favor of the plaintiff and assess his damages by reason of the prem-

ises at the sum of eight thousand dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant eight thousand dollars for his damages, in manner and form as aforesaid assessed, and $—— for his costs of suit, and have execution thereof.

16 *Motion for New Trial on Exceptions. Filed Dec.* 11, 1886.

In the Supreme Court of the District of Columbia.

FRANK A. TOLSON, Plaintiff,
vs.
THE INLAND AND SEABOARD COASTING COMPANY, Defendant.

Now comes the defendant, by its attorney, and moves the court for a new trial on exceptions taken at the trial.

NATH'L WILSON,
Att'y for Def't.

Motion for a New Trial Because Evidence Insufficient & Damages Excessive. Filed Dec. 11, 1886.

In the Supreme Court of the District of Columbia.

F. A. TOLSON, Plaintiff,
vs.
THE INLAND & SEABOARD COASTING COMPANY, Defendant. } At Law.

Now comes the defendant, by its attorney, and moves for a new trial in the above-entitled cause—

17 1. Because the evidence is insufficient in law to sustain the verdict.

2. Because the damages awarded by the jury were excessive.

NATH'L WILSON,
Att'y for Def't.

Motion for New Trial Because Verdict Contrary to Evidence. Filed Dec. 11, 1886.

In the Supreme Court of the District of Columbia.

F. A. TOLSON, Plaintiff,
vs.
THE INLAND AND SEABOARD COASTING COMPANY, Defendant. } At Law.

Now comes the defendant, by its attorney, and moves the court for a new trial in the above-entitled cause—

1. Because the verdict is contrary to the evidence.
2. Because the verdict is contrary to the instructions of the court.
3. Because the verdict is unreasonable.

4. Because a new and material fact, unknown at the time of the trial and not ascertainable by reasonable diligence by the defendant, has come to light since the trial.

NATH'L WILSON,
Att'y for Def't.

18 SATURDAY, *December 18th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

FRANCIS A. TOLSON, Pl'ff,
vs.
INLAND AND SEABOARD COASTING CO., Def't. } At Law. No. 25170.

Upon hearing so much of the defendant's motion for a new trial as is addressed to the discretion of the court, it is considered that the same be, and are hereby, overruled.

Appeal by defendant.

Appeal from Order Denying New Trial. Filed Dec. 18, 1886.

In the Supreme Court of the District of Columbia.

F. A. TOLSON, Pl'ff,
vs.
THE INLAND & SEABOARD COASTING CO., Def't. } At Law. No. 25170.

19 Now comes the defendant, by its attorney, and appeals from the order of the court overruling and denying the motion for a new trial because the evidence is insufficient and because the damages awarded *awarded* by the jury were excessive.

NATH'L WILSON,
Att'y for Def't.

Appeal from Order Denying New Trial. Filed Dec. 18, 1886.

In the Supreme Court of the District of Columbia.

F. A. TOLSON, Pl'ff,
vs.
THE INLAND & SEABOARD COASTING COMPANY, Def't. } At Law. No. 25170.

Now comes the defendant, by its attorney, and appeals from the order of the court overruling and denying the motion for a new trial because the verdict is contrary to the instructions of the court and because the verdict is unreasonable.

NATH'L WILSON,
Att'y for Def't.

20 *Bond for Appeal to General Term. Filed Dec.* 18, 1886.

In the Supreme Court of the District of Columbia, the — Day of December, 1886.

FRANCIS A. TOLSON, Plaintiff,
vs.
THE INLAND AND SEABOARD COASTING COMPANY, Defendant. } At Law. No. 25170.

The defendant having appealed to the general term from the judgment pronounced herein on the 8th day of December, 1886, in the circuit court, and J. W. Thompson, H. A. Willard, Samuel Norment, and J. H. Baxter, sureties for said appeal, the defendant, for itself, its successors and assigns, the sureties, for themselves and each of them, their heirs and each of their heirs, executors, and administrators, appearing and submitting to the jurisdiction of said general term, hereby undertake and abide by and perform and pay its judgment, which they agree may be pronounced against all of them.

21 [SEAL.] THE INLAND & SEABOARD COASTING CO. OF THE D. OF C.,
By J. W. THOMPSON, *President.*
J. W. THOMPSON.
H. A. WILLARD.
SAM'L NORMENT.
J. H. BAXTER.

Approved.
A. B. HAGNER.

Dec. 18, '86.

DEC. 14, 1886.

We consent that on the overruling of the motion for new trial before the trial justice this undertaking may be approved as a supersedeas.

BIRNEY & BIRNEY,
Att'ys for Plaintiff.

22 *Order Extending Time to File Bill of Exceptions.*

In the Supreme Court of the District of Columbia.

FEB'Y 5TH, A. D. 1887.

TOLSON
vs.
THE INLAND & SEABOARD COASTING CO. } At Law. No. 25170.

The time for sett-ing and signing the bill of exceptions in the above-entitled cause is hereby extended te Feb'y 12, 1887.

A. B. HAGNER.

FEB'Y 12, 1887.

Hagner, justice.

FRANCIS A. TOLSON, Pl'ff,
vs.
INLAND AND SEABOARD COASTING COMPANY, Def't. } At Law. No. 25170.

Now again comes here the defendant, by its said attorney, and tenders to the court here its bill of exceptions to the rulings
23 of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record now for then, which is done accordingly.

24 In the Supreme Court of the District of Columbia.

FRANCIS A. TOLSON, Plaintiff,
vs.
THE INLAND AND SEABOARD COASTING CO. OF THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 25170.

The Defendant's Bill of Exceptions. Filed Feb. 12, 1887.

On the trial of this case the plaintiff, to maintain the issues on his part joined, offered testimony tending to prove that the defendant is and was on the 15th of September, 1883, a body corporate incorporated under the laws of the United States and the owner of the steamboat John W. Thompson, which said steamboat was on the day and year aforesaid and at the time the injury complained of in the declaration was inflicted engaged in the transportation of freight and passengers on the Potomac river, under the management of the defendant, its servants and employees, and that said steamboat is of about 500 tons burden.

And thereupon the plaintiff appeared and was sworn as a witness on his own behalf and testified as follows:

25 In the Supreme Court of the District of Columbia.

TOLSON
vs.
INLAND SEABOARD C. CO.

WASHINGTON, D. C., *December* 2, 1886.

Court met pursuant to adjournment.

Present: On behalf of the plaintiff, Birney & Cole, and on behalf of the defendants, Nathaniel Wilson, Esq.

Testimony for Plaintiff.

FRANK A. TOLSON sworn and examined:

By Mr. BIRNEY:

Q. You are plaintiff in this case?
A. Yes, sir.

Q. Where do you reside?
A. King George county, Virginia.
Q. How far from this city?
A. I guess about 45 miles.
Q. What was your occupation in 1883?
A. Farmer.
Q. Where is your farm located with reference to the river?
26 A. It is situated opposite Maryland Point.
Q. Is the farm directly on the river?
A. Yes, sir; on the river.
Q. There was a pier near your property. Were you at that time in possession of that pier?
A. Yes, sir.
Q. State what it was used for.
A. Landing for boats. I had it built to have all boats stopped there; it was a part of my means of making a living.
Q. Will you describe that?
A. It was built in the shape—about 12 or 14 feet front and runs back to about 30 feet; the front of the wharf is about 12 or 14 feet and the back of the wharf is about 30 feet and runs in this shape, tending towards the land on that side, that side or the front, and it runs back, I think, about 28 feet on each side. I think that is about the dimension. I have never measured it carefully.
Q. When was that pier constructed?
A. In 1883.
Q. At what time was it finished in 1883?
A. I think it was finished somewheres in June. I did not keep the dates, but I can get the dates. I think it was in June.
Q. I do not care particularly about the month. It was in the summer of 1883?
A. Yes, sir.
Q. How far from the shore is it?
A. 227 yards.
Q. You are certain about that?
A. Yes, sir.
27 Q. Look at these photographic pictures which our friends on the other side have been kind enough to take and let me know which one of them best shows the pier?
A. This is the plainest picture (indicating). They both show very well. Let me see that one. The one looking west is clearer than the other.

(Mr. Birney describes to the jury the different photographs.)

Q. How does the pier face?
A. That pier faces from the Virginia side to Maryland Point—oblique across to Maryland Point. That is the way that pier faces.
Q. Which is up the river?
A. This is up the river, and that is down (indicating). This side is up towards Maryland Point, and that side is down towards——
Q. The rear of that pier is towards your farm and residence?
A. Yes, sir; 227 yards back is my place.

Q. There is a shoal, I believe, between the shore and the pier?

A. Yes, sir.

Q. How far from the shore is your house?

A. I guess about equal distance. My house from the landing—they have to come down the road—is about the same distance, 200 or 300 yards.

Q. From the shore in front of your house?

A. 30 or 40 yards. It is up on a high bank. The distance acorss, I suppose, is 30 or 40 yards.

Q. Do you know the steamer John W. Thompson?

28 A. Yes, sir.

Q. By whom was that steamer run and managed in 1883?

A. The Inland and Seaboard Coasting Company; Jane Moseley and other boats; all considered the same company.

Q. It was one of the boats of the Inland and Seaboard Coasting Company?

A. Yes, sir.

Q. Will you state to us the occurrences of the 15th of September, 1883, which caused your injury of which you complain here?

A. It was the morning before I was hurt. I had started—well, a week or two before that I had started a barn, and that morning I was up on top of the roof covering the roof with some boards about three feet long, oak boards, that we get out there in the country. I had been up there two or three hours in the morning; about the time the boat was due. When it was below Stewart's wharf some four or five miles my wife hallooed from the house and told me there was some one who wanted to see me about going off——

COUNSEL: Do not state what your wife said.

The WITNESS: I wanted to tell the whole thing.

The COURT: But we have not time.

Q. Somebody wanted to put something on the boat; is that it?

A. Yes, sir. I am not going to say anything of what my wife said, but I want to show how it happened right straight along. She called me to give me this information, that there was some one——

The COURT: There is no use saying what she said.

Q. Your went down, did you?

A. Yes, sir; I went to the house, and there I met a lady, Miss Karns, daughter of E. E. Karns. She told me——

29 The COURT: Never mind that.

Q. What did she give you?

A. I went along down to the landing with her, and there was a little colored boy who had a basket of pears, holding about a quarter of a peck or probably a little more, but a very small basket, and an empty demijohn, and she said——

The COURT: Do not tell anything that the black boy said there.

COUNSEL: Never mind what was said.

The WITNESS: I would like to tell it right straight along.

The COURT: Oh, no.

The WITNESS: I took the basket she wanted shipped up. She told me——

COUNSEL: Never mind what was said. She wanted to send it to Washington?

The WITNESS: Yes, sir. I put it in the boat. My wharf is situated from the landing about—well, 227 yards. I put the basket in the little boat on the shore, and the demijohn. I took it from the colored boy, and about that time the Thompson had left Stewart's wharf, below me, and was a good ways up, nearly, I suppose, within three or four minutes of the wharf. The day was perfectly calm; the tide was running up very strong. I bade the lady good-bye, and she told me——

The COURT: Never mind what she told you.

THE WITNESS: I went out and got these things right on the wharf. I put the demijohn down at one place and the basket at another, and then inside of the house I had another small box
30 belonging to Miss Julia Jackson—that is, it was directed to her. I took the box and put on the manifest and made a manifest for all three of these things. There was one of the baskets—that is, a little basket was directed to Mr. Carpenter, the mate of the boat; the demijohn was directed to Mr. Whitney, the box to Miss Julia Jackson. I made the manifest out according to the directions, and when the boat came up I just, as a signal, waived my manifest, and she came along up—right straight along up to the wharf—and when she got within, I suppose, two lengths of the wharf, there near the wharf, as you all see situated, the boat headed; came up this way (indicating) right in front of the wharf. There is Stewart's (indicating); here is my wharf (indicating); she came right along straight up this way (indicating) and when she got within probably two lengths of the boat the pilot hallooed out to me: "Why in the hell don't you put the signal up, the flag? What have you got? Hurry up." By that time the boat was just in that position (indicating); I suppose her bow a little beyond my wharf, and he ran out of the pilot-house here and came on back, and from his remark I looked up this way at him (indicating), and when he came out I felt kind of confused, because he had never made such remarks to me before and I thought them rather rough, and he came out of the pilot-house and came over to the paddle-house and he rang the bell two or three times. I did not know whether to go back or which way, but, however, the boat just about that time—I got ready to catch the lines, as I thought from his actions—it is generally customary to hand the lines, and so on, and I got ready to catch the lines, and this boat came right straight back in this way and
31 back in that way (indicating), and before I got out of the way she struck this end of the wharf, and in striking it—I was standing off from the wharf about that far from the outside post, her capstan post, where we put the line on, a pile there and a pile here; I was standing in about that position (indicating). She struck this wharf a terrible blow right here, and in doing so it mashed all the planks up; jammed them up and threw me forward, and before I could get out of the way the outside pile mashed in these planks, breaking the outside plank, and a piece of it came over and caught my foot in there (indicating). Just about the time I was caught I

had my hand this way (indicating). Mr. Carpenter reached over and jerked a little basket I had in my hand I intended to give to Mr. Carpenter. I was afraid if I put it there with the rest of the freight they would not take it up. Just about the time I was struck he grabbed me by the arm and grabbed the basket off, and I remarked to him, "My God, Webb, tell them to do something; they are killing me." Just as I said that the boat moved off and left the demijohn and box on the wharf. They then went up the river, and I hallooed, "For God's sake, don't leave me." Somebody hallooed, Lay down on the wharf and hoist the flag up, and halloo ashore. I went on to ask them, for God's sake, not to leave me, and they went up the river about 300 or 400 or 5,000 yards. While they were gone I laid down on the wharf for fear I might faint and fall overboard, or something of that sort. They came back, and Mr. Carpenter was the first one—they made the landing, and Mr. Carpenter was the first one who came off, with a bucket of water and some lint to wrap my foot up in. He told me to put my foot in the water
32 to keep it from swelling and as soon as I got ashore to send for the doctor. I was suffering very much, and I asked them, for God's sake, to carry me ashore, and they put me in my small boat and they carried me ashore. There was some conversation there——

Q. You were just taken up to the house?

A. Yes, sir; by the two colored men who were in the boat.

Q. You sent for the doctor?

A. Yes, sir; a doctor was sent for immediately.

Q. What doctor?

A. Dr. Ashton.

Q. How long after your injuries did Dr. Ashton first see you?

A. I think he was there—I cannot tell exactly the hour, but not over a couple of hours. He lives about six miles from my house.

Q. Before the boat had touched the wharf at all had she passed the wharf?

The WITNESS: Before she touched the wharf?

COUNSEL: Yes.

A. Yes, sir; her bow probably was a little above one end of the wharf.

Q. How near the wharf had she passed? The boat came up the river. Supposing this to be your pier (indicating); she came up the river and passed it without touching it?

A. Yes, sir.

Q. How near the wharf did it come?

A. She probably was her width from the wharf.

Q. How far did she pass the wharf?

A. The wharf is, of course, much shorter than her length. Her bow was above this end of the wharf (indicating) and probably her stern was not. That is about the position she laid in; her bow
33 was above the wharf.

Q. In what way did she then reach the wharf?

A. Then she came back in this was (indicating).

Q. Backed up?

A. Yes, sir; backed up against the tide, and backed her stern in across the point of that wharf.

Q. Something like that?

A. Yes, sir; this is the outside of the wharf, and she came back in that position (indicating).

Q. At what part of the pier did she strike?

A. (Referring to a photograph.) That is the front part of the pier, from there to there (indicating). The front lay in that way. This, from that pile there to back here, is the other part of the wharf—in that way (indicating). She laid right in that position; she came back to that position (indicating).

Q. You have gotten the wrong side. The wharf faces east, isn't it?

A. East.

Q. (Handing witness No. 2 photograph.) Please indicate there, as near as you can, against what part of the pier the boat struck as she backed up. You say she backed below the pier; where did she strike?

A. She struck on the corner—north corner, I should judge; that, I should say, was the lower front corner. I do not know exactly.

The COURT: Down the river?

The WITNESS: Yes, sir; next to Stewart's wharf.

Q. Farthest from your land?

34 A. Yes, sir.

Q. And down the river?

A. Yes, sir.

Q. It is the lowest front corner?

A. Yes, sir; I don't know exactly the direction by the compass. I could not tell it correctly.

By Mr. BIRNEY:

Q. The river is very irregular?

A. But I can tell the upper corner or lower corner.

Q. Struck the lower corner?

A. Yes, sir.

Q. What is that little post in there (indicating)?

A. That is where they put the capstan post.

Q. Or snubbing post?

A. Yes, sir; the capstan post.

Q. That is used for what purpose?

A. To put the line over when the boat makes fast to stop at the wharf.

Q. Where were you standing at the time the boat struck?

A. I was——

The COURT: What corner is that?

A. It is just near the lower front corner.

Q. Where in relation to the capstan post were you standing?

A. I was standing with one of my feet resting against that post.

Q. Against the capstan post?

A. Yes, sir; and I was facing—this picture don't give it exactly right. I was facing Stewart's wharf that way (indicating).

35 Q. Down the river?

A. Yes, sir; the boat was coming up the river, and was facing towards the boat coming up, with my foot resting here (indicating). It is about the distance of three feet or more between here and all these posts inside. I was at the capstan post where they always stand—every man who attends to the wharf. There is no other place for him to stand at to attend to the wharf.

Q. How far from the front of the wharf is that capstan post?

A. I should think it was in the neighborhood of three feet from the front of the wharf—three feet from the front of the wharf or the side of the wharf; fully three feet. I never measured exactly.

Q. How many piles are there at that corner of the wharf?

A. At the corner of the wharf there are three heavy oak piles.

Q. Do you know how far down the bottom of the river those piles are driven?

A. Not exactly; they were cut, I think, 30 feet long or 35 feet long—those oak piles.

Q. Of what material was the body of the wharf made?

A. The stringers were made out of this large pine—heavy pine; very nice pine logs for the stringers; then the flooring was oak—chestnut oak.

Q. How thick—how heavy?

A. Two-inch planking.

Q. About how broad?

A. Some of the planks were ten inches, and some eight inches; not all the same length.

Q. The floor of the wharf, you mean?

A. Yes, sir; not all of the same width.

36 Q. How fastened?

A. With spikes; yes; with spikes. I do not know what size you would call them, but heavy spikes.

Q. Driven into those stringers below?

A. Yes, sir; those stringers were hewed off so as to haul the bark; they were the heart of the stuff. They were put up there nicely.

Q. Who built the wharf?

A. Mr. Rogers.

Q. What is his business?

A. He is a regular wharf-builder.

Q. He built it for you?

A. Yes, sir.

Q. Will your describe to the jury, if you please, what your injury was—how you were hurt?

The WITNESS: What—how I was hurt?

COUNSEL: Yes.

A. My foot was crushed off here (indicating); left one toe, this large toe, and a piece of a toe that comes up; the doctor saved that. The balance of my foot was taken off. That is the toe (indicating). The *the* bottom of my foot was all mashed up, too.

Q. What was done with that?

A. The doctor partly healed it up.

Q. How much of your foot was amputated?

A. I had three toes taken right off; then a great deal of the flesh underneath the bottom of the foot; that is healed up.

Q. Was part of that flesh amputated?

A. Yes, sir; a large piece was taken right off the bottom of my foot.

Q. What was the condition of your foot when you first saw
37 it after the accident?

A. It was just after the accident. It was all mashed up; I could not tell what was the matter with it; it looked bloody, and I thought I had lost my whole foot. The pain was very severe and I could not tell exactly what was the matter, but it was all full of blood and squashed out of the shoe, &c.

Q. How did it effect the shoe?

A. It mashed the shoe all to pieces. My foot came out of here and out of here (indicating.) The shoe was mashed right out; just the same as if it had been in a vice.

Q. What has been the condition of the foot from that time on?

A. It has never healed up, and I am unable to do anything. A month or two ago I was compelled to stop walking almost; I suffer every time I walk, especially here in the streets; I cannot stand it no time at all. In the country, where the ground is soft, I can get along a little better, but still I am unable to do any farming that has anything to do with walking.

Q. What effect has it upon your ability to pursue your occupation as a farmer?

A. I have had to stop altogether, except I have had to hire persons to do what I could do myself before that.

Q. How does it effect you in walking in the country?

A. I cannot walk at all; I do not go unless I am compelled. I go out and see to the feeding of the hogs and horses and something that is light outside; maybe a few yards from my house. That is about all I can do.

Q. How does it effect you when you ride?

38 A. I cannot ride at all—no distance; my foot hanging down that way, it causes it to swell. I cannot ride as well as I can walk.

Q. You say the foot is not healed?

A. No, sir.

Q. Have you had it under treatment?

A. Yes, sir; the doctor has never stopped. I get his medicine and use it now.

Q. You continue to dress it and take care of it?

A. Yes, sir; all the time.

Q. What doctor has attended you?

A. Dr. Ashton, King George county.

Q. He is one of the physicians of King George county?

A. Yes, sir.

Q. Have you had the foot examined here?

A. Yes, sir.

Q. By whom?

A. By Dr. Lincoln. I had it examined a year or two ago a little.

35 Q. Down the river?

A. Yes, sir; the boat was coming up the river, and was facing towards the boat coming up, with my foot resting here (indicating). It is about the distance of three feet or more between here and all these posts inside. I was at the capstan post where they always stand—every man who attends to the wharf. There is no other place for him to stand at to attend to the wharf.

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A. Dr. Ashton, King George county.

Q. He is one of the physicians of King George county?

A. Yes, sir.

Q. Have you had the foot examined here?

A. Yes, sir.

Q. By whom?

A. By Dr. Lincoln. I had it examined a year or two ago a little.

Q. Did you give the date at which this occurred?

A. Yes, sir; September 15, 1883. It occurred between twelve and one o'clock that day.

Q. Do you know where the pilot was at the time of that accident?

The WITNESS: Do I know where he was?

COUNSEL: Yes.

A. Yes, sir; he was right over the paddle-house; whatever you may call it.

Q. How far from the pilot-house?

39 A. That is half the length of the boat, I judge.

Cross-examination by Mr. WILSON:

Q. You say this wharf was built in the spring or summer of 1883?

A. Yes, sir; it was built in the spring.

Q. What time was it finished?

A. I could not tell you the dates exactly. I think it was finished somewhere in June. I can get the exact date.

Q. No; I only want to know the month.

A. I do not know; I cannot tell you.

Q. Finished in June?

A. I say I cannot tell, but I can find out the dates from the time I paid Mr. Rogers. He built the wharf, and when he finished it I paid him the money.

Q. What did it cost?

A. He has the bill. He can tell you what it cost.

Q. You do not know?

A. I might know. I guess it cost about—now, I could not tell you. $125 or $130 was the bill, but he has the bill. He can tell you exactly what it cost. There were some little extras afterwards, and bolts and things that I do not know about. I do not know precisely the amount.

Q. What was the piles made of?

A. Some of them of pine and some of them of oak.

Q. There were three piles on each corner, weren't there?

A. Yes, sir.

Q. What were they made of?

40 A. Oak.

Q. All six piles were of oak?

A. Yes, sir.

Q. Were they fastened to the wharf?

A. No, sir; I do not think they were, since I looked at them here. I do not think they were fastened.

Q. Were they loose?

A. They were jam up against the wharf; tight up against the wharf.

I always thought they were bolted.

Q. Didn't move backwards and forwards?

A. No, sir.

Q. Not what they call spring piles?

A. I do not know the difference between spring or any other kind.

Q. You do not know the difference between spring piles and any other kind?

A. No, sir; they were made fast to the wharves.

Q. There are two kinds of piles here—the piles that the sleepers rest on and the piles that are around the edge on both sides?

A. Yes, sir.

Q. Now, look at photograph No. 2 and at the piles at the end of the wharf. There are three piles at each end?

A. Yes, sir.

Q. I am asking you now about three piles at the corner down the river and three piles at the corner up the river. They were made, you say, of oak?

A. Yes, sir.

Q. And they were not fastened to the wharf, but were against the wharf?

41 A. They were jam up against the wharf.

Q. But not fastened to the wharf in any way?

A. No, sir; not that I know of.

Q. Did they move backwards and forwards?

A. No, sir.

Q. No spring to them at all?

A. No, sir.

Q. You know there are such things as spring piles that are put there for the purpose of guarding the wharf?

A. Yes, sir; I know what you mean by spring piles now; one that sets way out from the wharf, I think.

Q. So that these were close against the wharf? Anything moving along in front of the wharf, scraping against the wharf, would not that move the piles if they were not fastened?

A. I do not think it would; those piles were fit so close to the wharf that Mr. Rogers dug the plank out, the last plank that fit into the piles, so that the piles set in with the plank in that way.

Q. I have a little model here which will enable you to explain what you mean and what I mean. This describes the front of the wharf, looking out towards the river. These are three piles that are at the corner down the river and up the river (indicating)?

A. Yes, sir.

Q. The planks run parallel with the channel?

A. Yes, sir; that is correct.

Q. Those planks, you say, are about two inches thick?

A. Yes, sir; two inches; that is what I paid for.

42 Q. What is the size of those piles?

A. They were very heavy.

Q. What is the diameter?

A. I could not tell you.

Q. About?

A. Large piles; as big around as that (indicating).

Q. That would be two feet in diameter?

A. I do not know what it would be, but that is about what it is.

Q. These piles, you say, are not fastened to the wharf?

A. They were not spiked.

Q. Not spiked to the wharf, not fastened by clamps, that you know of?

A. No, sir.

Q. You say they were wedged up close against the wharf, and you said there were in the board, as I understood you, places cut corresponding, so that the piles would fit in?

A. Yes, sir.

Q. Was that true in regard to each one of the piles?

A. This one here (indicating) was not put in at all; it was not into the board at all. The board is jammed up against it in that way (indicating). These piles were all let into this board; fir so close they were let into the board.

Q. How far were they let into the board?

A. Probably an inch or so; just so that Mr. Rogers cut off his boards, and, this being the last board, it was wedged up tight against the piles.

43 Q. The question was asked you whether a boat or anything moving alongside the wharf could not move these piles?

A. It never did.

Q. Because they were held in place by those little holes in the board?

A. I do not know whether that held them or not, but they never did move.

Q. What was your arrangement with the company about landing there and taking on and putting off freight?

A. I made no arrangement with the company at all. It was understood wherever a wharf was built on the river, boats stopped at it and paid the usual percentage—ten per cent. I made no arrangement with any boat. They all stopped, and at the end of the month they all paid up the ten per cent. They kept an account of what was shipped.

Q. Ten per cent. of the freight?

A. Ten per cent. of the freight and passengers. We got ten per cent. of the freight and passengers—all alike.

Q. Ten per cent. of what was paid to the company?

A. And the company charged so much for a passenger, and we got ten per cent. of it.

Q. If five dollars were paid for passengers, you got fifty cents?

A. Yes, sir; and freight for a dollar we got ten cents.

Q. That arrangement has been going on since the time you built the wharf?

A. Yes, sir; for fifteen years.

Q. I mean with reference to your particular wharf?

A. Yes, sir.

44 Q. What do you do with relation to the putting on of things from the land to the wharf; what was your part of the business?

A. My part was to attend to the wharf as wharf agent.

Q. Wharf agent?

A. Yes, sir; that is what they call them.

Q. You received freight that was to go up the river from the landing and took it on your boat to the wharf?

A. Yes, sir.

Q. And then what did you do with it?

A. I generally made a manifest of it and gave it to the boat, showing them what was to be shipped.

Q. How was the manifest made out?

A. They have printed forms stating, first, the article shipped, one box; then the party shipped to; one box, Julia Jackson, to and so in the city.

Q. And signed?

A. Yes, sir.

Q. And signed by you?

A. Oh, no, sir. What, the manifest signed?

COUNSEL: Yes.

A. No, sir; no signing at all.

Q. You make it out?

A. Yes, sir; I get the articles out. The box of fish or so many bunches of fish, ten bunches of fish, comes from Capt. Joe Caywood to N. White, Washington, D. C.; put the date to the manifest, and the name of the wharf.

Q. In the manifest?

A. Yes, sir; the manifests are printed for each boat. I
45 think the Thompson had some printed manifests, for I generally made them out on a piece of blank paper.

Q. You did not sign it?

A. No, sir; I never signed it.

Q. Then the manifest, when it is made out, you gave it to the boat when it comes along?

A. Yes, sir; I gave it to the clerk.

Q. Do you keep any record in your books?

A. Yes, sir; I did, when I wanted to see whether the boat was cheating me or not.

Q. You put them down?

A. Yes, sir.

Q. And then the goods went on board, and then you were settled with according to the requirements of the manifest?

A. Yes, sir.

Q. Whatever the manifest and your books showed was shipped you got your percentage for?

A. Yes, sir.

Q. How was it in regard to things that came from the wharf?

A. We received a manifest from the boat stating there was so much to be landed. There it was on the manifest. I generally looked at the manifest, and if those things were on the manifest all well and good; if not, I called the clerk's attention to it—that such and such things were not landed; that ended my business there.

Q. Did you deliver the things that come by boat from the city?

A. No, sir; parties come there and get them; parties know
46 generally when they were to be landed; when they expected

a barrel of flour or box of sugar they knew it was coming down and come and took it.

Q. And gave a receipt for it?

A. No, sir; they didn't sign any receipt.

Q. What were your duties and what did you do in regard to putting things on and off the boat?

A. There was no duty or anything but to give the manifest—to make up the things.

Q. And they came on the wharf after getting the manifest and got what was to be taken and put it on the boat?

A. Yes, sir.

Q. And took it off?

A. Yes, sir.

Q. And you had nothing to do with the handling?

A. No, sir; the clerk came off from the boat. I gave him the manifest, and he would look over it to see if it was right and carry the manifest aboard. He would see that the things were right.

Q. And carried the things on board?

A. Yes, sir.

Q. I see that on the photograph here there is a flag?

A. Yes, sir.

Q. You say that the captain asked you why you did not show a signal?

A. Yes, sir; he asked me why I didn't put the flag up.

The COURT: The captain?

A. No, sir; the pilot.

Q. Did you have the flag?

47 A. I do not know whether there was a flag there or not. I think there was one, but the boats were running in opposition and no flags are ever used on the wharf down at the river now.

Q. I am not speaking of what happens now, but what happened then.

A. Well, then.

Q. You did not use the flag then?

A. No, sir; I had never used it at all. I think there may be a flag there or may not. I am not sure of it, but the flag stick, when a boat was going by and passengers going down the river, and the boat probably not have any freight, we had that flag stick to call them in going down, for a passenger going down the river. The boats always stops at the wharves in coming up, and do it yet. There is no flag hoisted at any wharf.

Q. Do they stop at your wharf?

A. No, sir; the Thompson doesn't.

Q. Why not?

A. Because—on account of this lawsuit, I suppose.

Q. Isn't the wharf swept away?

A. No, sir; other boats stop there.

Q. Now?

A. Yes, sir; the Mattano and Wakefield.

Q. Wasn't the wharf swept away last winter?

A. Injured right smart; nothing hurt much.

Q. The boats have constantly stopped there since?

A. Yes, sir; all the time.

Q. You say that wharf is about how wide in front—across
48 the front there?

A. I guess it is 12 or 14 feet.

Q. From here (indicating), from 12 to 14 feet; is that about the distance (measuring off)?

A. No, sir; I do not think it is quite that wide; you are going too far.

Q. Wider than that?

A. I should judge it was about there (indicating). I should think that was about the width of it.

Q. And there are three large piles here and three there indicating)?

A. Yes, sir.

Q. Now, will you state, with reference to this front, where you were standing. I would like for you to give us some idea of your position with reference to that post. You call that the snubbing post. How far was the snubbing post from the front edge of the wharf?

A. I think it is fully three feet.

Q. If that is the edge, then it would be about there (indicating)?

A. About.

Q. Will you please come here and give us an idea of just how you were standing?

A. I could not give you exactly by that table.

Q. I can understand you better if you will just indicate the position here and the distances. Suppose this is the front of the wharf along here. You say it is about this wide?

A. This is the front of the wharf from that wall there to here; that is the front of the wharf.

49 Q. What do you treat as the front of the wharf?

A. This railing. Here is a pile right there (indicating), and here is another one right here, and here is another one right here (indicating). Here is a snubbing post or hitching post right about here. Now, that is the position I stood in. It was in this position I stood (indicating) when the boat came up the river. I might have been a little farther than that. I do not think my foot was exactly against that post, but just in that way; if anything a little back, ready to catch the line. The boat was coming in that way, and that is the only position in which I could stand.

Q. You were looking down the river?

A. Yes, sir. This snubbing post is that far from the edge of the wharf here (indicating).

Q. How far?

A. About the same distance. Here the edge of the wharf goes out there.

Mr. COLE: Front three feet either way?

A. Yes, sir; and a boat can land on that side of the wharf or this side or that side.

Q. The water is deep there?

A. Yes, sir.
Q. As you stood there, these being the piles down the river?
A. Yes, sir.
Q. You stood there—this little pile was on your left?
A. Yes, sir; that pile was on the left.
50 Q. And you were looking right between those two piles?
A. I do not know whether I was looking right between those two or not. I was standing looking down the river. I do not know whether I was looking through those two piles. Here is the post (indicating), and I was right in between there.
Q. How far are the piles across? What is the distance between the piles?
A. Probably that much (indicating).
Q. How much—two feet?
A. No, sir; I do not think it was two feet; about a foot and a half or something like that.
Q. Is the distance about the same between them all?
A. I do not know. They are about the same, I judge.
Q. The boat, as I understand you to say——

By the COURT:

Q. How high were the piles above the wharf?
A. They came up, I guess, about there (indicating).

By Mr. COLE:

Q. About midway of you?
A. Yes, sir; that is about it.

By Mr. WILSON:

Q. About four feet?
A. About that.
Q. Then the little building was in the middle?
A. No, sir; it was way over here (indicating on the photograph).
Q. The boat, as you say, first came up, and it was about her width from the wharf?
A. Yes, sir; in this direction; headed in this way.
51 Q. And then she backed?
A. Yes, sir; she came back*ed* and backed in this way (indicating).
Q. And then she touched the wharf?
A. She turned below her paddle-house and struck off in this way (indicating). There was a strong flood tide struck her as she was coming back. Her position was this; she was going in this way; she stopped in this position (indicating).

By the COURT:

Q. Was there a rope thrown?
A. No, sir; the tide runs past this wharf right parallel with the wharf up or down the river; the channel goes that way. She was in this position (indicating).

By Mr. COLE:

Q. She swung her bow out into the stream?
A. Yes, sir.

By Mr. WILSON:

The WITNESS: And when she came back the tide swept her back in this way, and she backed at the same time.

Q. Where did she touch?
A. Right at this pile (indicating).
Q. She touched that pile first?
A. Yes, sir.
Q. What part of the boat touched first?
A. It was about half way between the paddle-house and the stern, what they call the after gangway.
Q. There is an after gangway open for the purpose of taking on and putting off freight?
52 A. Yes, sir.
Q. Who was standing at the after gangway?
A. There was Mr. Carpenter and Mr. Crow and some colored passengers. There is a colored passengers' saloon there, and they are generally out there looking around. It opens right into their saloon.
Q. Mr. Carpenter was the mate?
A. Yes, sir.
Q. His duty was to do what?
A. I do not know what his duty was.
Q. You saw him there as you approached?
A. He is mate of the boat?
Q. You knew him very well?
A. Yes, sir; I knew him very well.
Q. Did you say to him, "Webb, it's no use to throw out a line"?
A. No, sir; I said nothing of that sort.
Q. Did you say anything about a line?
A. No, sir.
Q. Did you ask him to throw a line?
A. No, sir; I never did.
Q. No line was thrown?
A. No line was thrown. They went right back to get the line.
Q. Who did?
A. I do not know; some deck hands—some colored men; I saw them.
Q. You did not say to him, "Webb, there is no use throwing the line; I have only these few things"?
A. No, sir; I never stated anything of the sort; it was not my duty to tell the captain what to do.
53 Q. They always threw a line?
A. Yes, sir; they cannot stop without throwing a line.
Q. You never had a boat stop there without throwing a line?
A. No, sir; I never had one stop in my life without throwing a line and throwing out the gang-plank.

Q. You say you were standing between that and the snubbing post—these two piles?

A. Yes, sir; that is where the wharf attenders have to stand.

Q. How near do you say you were to this pile (indicating)?

A. I was there (indicating)—about the snubbing post—about two or three feet. I could not tell exactly.

Q. That pile is the same distance from here (indicating) and from here (indicating)?

A. I judge it is; probably it is.

Q. Then you stood between that point and this point (indicating), which is a space of about three feet between the snubbing pile and the front pile? You stood half way between?

A. I stood right at the capstan post, where everybody stands.

Q. You stood there looking down the river?

A. Yes, sir.

Q. What did you have in your hand?

A. A small basket—a small basket holding about quarter of a peck; it was on my arm.

Q. On which arm?

A. On this arm (indicating).

Q. On the left arm?

A. Yes, sir.

54 Q. And what did you have in your other hand?

A. Nothing.

Q. Where was the demijohn?

A. The demijohn was setting on the box on the wharf.

Q. Where was the box?

A. On the wharf, and the demijohn was on top of it.

Q. Whereabouts?

A. Right below the capstan pile.

Q. Along here, do you mean (indicating)?

A. Yes, sir.

Q. Between the capstan pile and this——

A. Here (indicating) is the capstan pile, and this box set right here (indicating).

Q. Behind it?

A. Yes, sir; right here (indicating).

Q. And the demijohn was on it?

A. Yes, sir.

Q. Then the boat struck, you say, with such violence—such force—as to break up four or five planks?

A. Yes, sir; it broke up four or five; *sham*shed one all to pieces.

Q. Which one?

A. This one (indicating).

Q. Broke the front one all to pieces?

A. Yes, sir; just where the pile mashed it up. That part of it that was struck was mashed up; not all the plank all the way out; it was splintered.

55 Q. Do you mean to say half of it was gone?

A. Yes, sir; half of it was gone, I should think.

Q. And what injury was done to that one next to it?

A. None that I know of, only it was all broke up.

Q. State where your foot was when it was mashed—between what pieces of timber.

A. Here (indicating) is the plank; there may be three planks, and may be four; I do not know which. I was standing with my foot on this plank here (indicating).

The COURT: On the first outside plank?

The WITNESS: No; I did not have my foot resting on the outside plank, but on the next plank to it. When the boat struck here (indicating) it mashed all these planks together against this capstan post, and in doing so it mashed them all up in that style; it mashed them all up in that way and threw them up, and in doing so—just where that mark is there it represents exactly the board that was broken in two.

By Mr. COLE:

Q. It was the front board?

A. Yes, sir; when this boat ran up against this wharf it threw me first back in this way (indicating), and my foot slid right over into there (indicating). There (indicating) this board was broken in two, and when this board gave way the top piece of it came open and my foot slipped in; but this top piece came over and caught my foot in it.

Q. This middle pile?

A. Yes, sir; that pile came over with this piece of plank—clean over the top of the other piece. This is just about where somebody has marked it here.

56 Q. Your foot caught in the split of the board.

A. Yes, sir; the board came over the top of the plank with this pile.

By Mr. WILSON:

Q. When that happened where was the demijohn?

A. It was on the top of this box, right here (indicating).

Q. Where was the basket?

A. It was on my arm.

Q. How did it get off your arm?

A. Webb Carpenter's arm jerked it off.

Q. When did he jerk it off?

A. Just about the time the boat struck.

Q. Didn't you reach over and shake hands with him, and say "Good-bye"?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you hand him the manifest?

A. No, sir.

Q. Or the letter?

A. No, sir.

Q. What became of the manifest and the letter?

A. The manifest was in this hand, and he took it all out together. I do not know what became of the manifest.

Q. In which hand did you have the manifest?

A. If I had it in any hand I had it in this one—left hand.

Q. Did you have it in any hand?

A. I think I did; I think I had it in this left hand.

57 Q. And you had the basket in your left hand?

A. Yes, sir; on my arm.

Q. Where was your right hand?

A. It was here (indicating) by my side.

Q. Where was your right hand then?

A. It was in the same place.

Q. I am very glad to know that you did not lose your right hand, because then you would have brought a suit for very much heavier damages, I suppose. Where at the time was your right hand? You say you had the basket and the manifest in your left hand?

A. Yes, sir.

Q. Now, where was your right hand? Was it down at your side?

A. It was in the same place. I cannot tell you whether it was up this way (indicating) or up that way (indicating).

Q. Was it around either one of these piles?

A. No, sir; it was on nothing.

Q. You know it was on nothing?

A. Yes, sir.

Q. Then do you know whether it was on your side?

A. I do not know.

Q. How did you come to reach out the basket and manifest with your left hand? Are you left-handed?

A. No, sir; I am not

Q. Tell me, if you please, as near as you can recollect just what your right hand was doing at that time when Mr. Carpenter grabbed the basket and the manifest from your left arm.

A. My right hand was doing nothing that I know of.

58 Q. You were standing here (indicating) when he grabbed it off?

A. Yes, sir.

Q. Was your face turned in this direction or in that direction (indicating)?

A. Turned down towards where the boat was going to make a landing.

Q. Wasn't your right arm around that pile?

A. Oh, no, sir.

Q. It was not?

A. No, sir; most positively not.

Q. Where was your right hand?

A. It was down at the side of me. I do not know where it was. My right arm was around nothing.

Q. Did Mr. Webb Carpenter reach up through those piles from the boat and take from your arm the manifest and the basket?

A. No, sir.

Q. How did he get them?

A. When the boat threw me out there I caught my left arm against the outside pile that had mashed me.

Q. Here is the boat now, you understand, right here (indicating). Mr. Carpenter is on the boat. How far below the wharf—the floor of the wharf—was the deck of the boat?

A. I could not tell you exactly, but I guess it was very near even.

Q. Then how far was it from the deck of the boat or from the after gangway there (indicating)? Do you understand my question?

A. I guess so.

Q. The boat could not get right to the wharf?

59 A. No, sir; could not because of difference between these piles.

Q. There was the whole width of the pile distance, wasn't there?

A. No, sir; not exactly.

Q. How, then, was it?

A. The pile was sunk in a little bit.

Q. How far do you suppose it was from the edge of the boat over to the outer gangway—to that floor—how many inches?

A. I suppose, as far as feet are concerned, this end of the wharf here—I suppose that would bring it about right.

Q. It was about there (indicating)?

A. Yes, sir.

Q. Then Mr. Carpenter stood on the boat about there (indicating)?

A. Yes, sir.

Q. You were right there (indicating)?

A. Yes, sir; at that capstan post.

Q. Looking down the river?

A. Yes, sir; that was before I was hurt.

Q. I mean before you were hurt.

A. That was the position I was in before I was hurt.

Q. When the boat struck you were thrown forward?

A. First I was knocked back and then thrown forward.

Q. In which way were you thrown?

A. Right facing the boat.

Q. Were you thrown between these two piles?

A. Yes, sir; in that way (indicating); right facing the boat.

Q. Did your left hand come in between those piles?

A. No, sir.

60 Q. Then his hand must have come clear over hear and reached you on the wharf?

A. No, sir; I cought hold of this pile here to keep from going.

Q. What I want to know is how he got hold of your arm, of the manifest, and of the basket?

A. I can tell you pretty plainly. There is a pile; after being thrown back this way (indicating), then I rebounded, I suppose, and came there (indicating), and when I caught myself to keep from falling over I rested my hand on this pile.

Q. Which hand?

A. The left hand. He grabbed this way (indicating).

Q. He reached over that pile, did he?

A. I guess he was about on a level with the pile; the same as I was on the wharf.

Q. Just about the same?

A. Yes, sir.

Q. Did he reach up over the pile?

A. There was no reaching up to do.

A. And took these things from your arm?

A. Yes, sir.

Q. He took the manifest from your arm?

A. He took the basket.

Q. The basket he took from your arm and the manifest from your hand?

A. Yes, sir; I think I had the manifest in this hand. It may have been sticking on the basket, but I know he took the basket from my arm.

Q. The demijohn way away back here in the meantime?

61 A. Yes, sir; on top of the box.

Q. After he took the basket from your arm what did he do?

A. He had hold of my arm at the same time and the basket, and I suppose I might have felt the basket at the same time in the going, and I said, "My God, Webb, let go me; they are killing me." I thought he had hold of me, and I reached forward just as I made those remarks. He said "My God," and ran forward. I said, "Please don't leave me; for God's sake, don't leave me." The boat moved off and left the demijohn on the wharf.

Q. Before your foot got hurt you and Mr. Carpenter were not, then, talking pleasantly together?

A. No, sir.

Q. You did not shake hands with him and say "Good-bye, Webb," or anything of that kind?

A. No, sir.

Q. Do you remember seeing Col. Gibbon, the gentleman sitting by that post over there—do you remember seeing him at that time?

A. No, sir.

Q. You do not remember of seeing him standing right by Carpenter?

A. No, sir.

Q. You do not remember that your right arm was around that pile?

A. Yes, sir; I remember it was not around there.

Q. You remember that distinctly—that it was not?

A. Yes, sir.

Q. But that you were thrown forward, and you reached over that middle pile there, and he grabbed, as you expressed it?

A. Yes, sir; just on top of it. I could not reach no pile. I reached on top of it.

62 Q. You are sure you did not reach between those two piles?

A. No, sir; I did not.
Q. Then how far did the boat go away before she——
A. I guess she must have gone 300 or 400 yards.
Mr. COLE: Do you mean after the witness was hurt?
Mr. WILSON: Yes.
The WITNESS: 300 or 400 yards.
Q. I understand you to say that they left the demijohn and the basket on the wharf.
A. Yes, sir.
Q. They did do that?
A. Yes, sir.
Q. What do you mean by that?
A. I mean that they did not take it.
Q. Did not take it?
A. No, sir.
Q. What became of it after Mr. Carpenter grabbed it from your arm?
A. He did not grab any demijohn.
Q. I understood you to say that he left the demijohn and the basket on the wharf.
A. No, sir; I did not say anything of the kind.
Q. I beg your pardon. You did not, then, say anything of that sort?
A. No, sir.

By the COURT:

Q. Did this boat strike when she was backing?
63 A. Yes, sir; I mean she struck when she came back.

By Mr. WILSON:

Q. Was she still backing or had she ceased from backing and was heading up the river when she struck?
A. When she came from Stewart's wharf she came along to my wharf, and when she got up in that position she stopped her headway and came back.
Q. The judge asked you whether she struck when she was still going back this way (indicating), or whether she struck after she stopped going back and when she began going forward again and was carried up by the tide?
A. She struck when she came back.

By the COURT:

Q. Had she ceased to come back then?
Mr. WILSON: She was backing down the river when she struck?
The WITNESS: Yes, sir; a little way ahead of the wharf and came back.
Q. Here is the boat; she starts to go back?
A. Yes, sir.
Q. Did she strike that corner pile when she was going back?
A. Yes, sir; when she was going back.
Q. Then she stopped?

A. That jar stopped her.

Q. Then she went forward again?

A. Yes, sir; she went up the river again.

Q. Was it the force of the engine when she was backing that brought her against the pile or was it the force of the tide that brought her against the pile?

A. It was the force of the engine coming back.

64 Q. You say she struck the pile as she was coming back. She would strike the pile just in that way, wouldn't she?

A. Yes, sir.

Q. That would have been the motion of the boat?

A. Yes, sir; she was out from the wharf.

Q. I wrote it down here that you said that they left the demijohn and the basket on the wharf?

A. I said they left the demijohn and the box.

Q. That is what you meant to say?

A. I say they left the demijohn and the box on the wharf.

Q. They left the demijohn and the box on the wharf and took the basket. Then you never saw anything of the basket afterwards that was taken on the boat by Mr. Carpenter?

A. Yes, sir.

Q. And the manifest?

A. And the demijohn and box were taken on the boat when they came back.

Q. Do you know that?

A. Yes, sir; I know that.

Q. You told us to whom the basket was directed, I believe?

A. Yes, sir. The basket was directed to Mrs. Whitney and the demijohn to Mr. Whitney and the box to Julia Jackson.

Q. Then can you tell me—referring back to this thing one moment—if you heard the signal given to the boat to go ahead? How is that; did you hear it after or about the time you were hurt and handed the basket and the manifest to Mr. Carpenter? Did you hear the signal for the boat to go ahead?

A. I did not hear it at all.

65 Q. With reference to the time you were hurt, when did the boat begin to go ahead; to move off in this direction?

The WITNESS: When did the boat move off?

COUNSEL: Yes.

A. About a second or two after I was hurt.

Q. That is to say, she came down this way (indicating), and then in a second or two after you were hurt she began again to go up that way?

A. Yes, sir.

Q. You went off, as you say, some little distance?

A. Yes, sir.

Q. After you were hurt you went and sat down on the box that was here by the little house?

A. For a minute I sat on the box. Somebody hallooed to me to lay on the wharf and hoist the flag and halloo. I was frightened

for fear I might faint or something of that kind and fall over, and I got off the box and lay on the wharf. I laid right flat down.

Q. Then some people came off the boat and took you ashore?

A. Yes, sir; when the boat came back.

Q. Who took you ashore?

A. Webb Carpenter and a colored man by the name of Scott and one by the name of Alexander.

Q. Who else?

A. Those were all.

Q. Two men, Alexander and Scott?

A. Yes, sir.

Q. They took you to the shore?

A. Yes, sir.

66 Q. In your little boat?

A. Yes, sir.

Q. Who was there at the time?

A. My wife was down there to meet me.

Q. Do you remember what occurred then?

A. Yes, sir; I pretty well remember what occurred.

Q. Did you have the wharf repaired this winter?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. It is just in the same condition now as when the photograph was taken?

A. No, sir.

Q. What is the difference?

A. It mashed some of the piles I put up and instead of having a square front it had a sharp front.

Q. You mean the wharf has a sharp front?

A. Yes, sir; those piles instead of being right where they are all come together.

Q. They are all jammed in that way?

A. Yes, sir; not exactly jammed up together.

Q. What is the distance between the middle piles?

A. I do not know.

Q. About?

A. About four or five feet.

Q. Is that all?

A. They throw out a gang plank, and you know the length of that.

Q. Do you mean to say that they are like this—those two are brought together (indicating)?

67 A. Yes, sir; they are jammed up together.

Q. And these?

A. I do not know about these. They are jammed up so that in throwing out the gang plank now they throw it out on the side.

Q. What do you mean by that?

A. On the side here.

Q. They land here (indicating); they do not land in front any more?

A. No, sir; the front is gone away on account of these piles being in this position.

Q. They cannot land there?

A. No, sir; they throw out the gangway plank between these piles, and then this one here——

Q. Are these planks in the same condition they were when the photograph was taken a year ago?

A. No, sir; the front part of the wharf has three or four planks carried away.

Q. Gone entirely?

A. Yes, sir.

Q. Have you any of them?

A. Yes, sir.

Q. Have you any parts of them?

A. Yes, sir.

Q. Pieces of them?

—. Yes, sir.

Q. Where?

A. I don't know whether it is worth while for me to tell now. You probably may see.

68 Q. You say it — not worth while for you to tell?

A. No, sir, not now.

Q. Why not?

A. I do not think that is proper. I think it is impertinent curiosity.

Q. Now, tell me, please, where they are.

A. You will see after awhile.

Q. I want to know now.

A. I do not know whether it is right for me to tell you or not.

The COURT: Answer the question.

The WITNESS: Yes; I have a piece of the plank.

Q. Of which one?

A. The piece I was hurt on.

Q. Which piece?

A. The front piece of the wharf.

Q. Of this half (indicating)?

A. That front piece of the plank there.

Q. Have you it here?

A. Yes, sir.

Q. Where did you get it?

A. I got it off the wharf.

Q. When?

A. Just before the ice carried it away. I carried a witness out there and walked out on the ice and got it off just before the ice broke it up.

Q. So that the ice has carried away all these planks except the piece you preserved?

A. Yes, sir. When I went out there the wharf was per-

69 fectly whole.

Q. Is that piece of plank here?

A. Yes, sir.

Q. I would like to see it.
A. It will be produced.
Q. Then have you had new planks put in there?
A. Old planks. I fixed that up myself.
Q. Old planks are put in the place there?
A. Yes, sir; probably maybe one or two of the same pieces.
Q. The piles are the same?
A. Yes, sir; there is no difference in the piles at all; they are all there.
Q. In your declaration you *cal*im, besides $20,000 for yourself, what you have expended, $50, for instance, in repairing the wharf after the injury happened.
The WITNESS: After the injury happened?
COUNSEL: Yes; after the wharf was injured. Perhaps you do not remember that.
A. I do not remember of saying how *h*uch.
Q. I will refresh your recollection. In the declaration in this suit you claim the sum of $50, being the amount expended by you in repairing the said pier or wharf. Did you expend $50 in your repairs?
A. No, sir.
Q. Another item here is that you paid out, laid out, and expended $500 for a cure of the injury received by you, bruises, &c. Have you paid that amount?
A. No, sir. I have not paid it, but am trying to. I have
70 paid $250 of the doctor's bill.
Q. Dr. Ashton's bill?
A. Yes, sir.
Q. You owe him the balance?
A. Yes, sir. I owe him yet, and will owe him more than that before he gets through with me.
Q. Those are moneys you have not paid, however?
A. I have not settled up with the doctor.
Q. What did you pay for the repairs of the wharf?
A. I had some parties come to the wharf and fix it up.
Q. Who were they?
A. Some of my friends.
Q. Who were they?
A. I do not remember exactly who they were. I had some friends who were tending the wharf and helping me out.
Q. When was the wharf repaired?
A. It has never been thoroughly repaired; only patched up.
Q. Who it was who repaired it you do not know?
A. I do not know exactly now; friends down there have been fixing it and charging me some little for it.
Q. Did you say how long you were confined in your bed under the care of the doctor?
A. I was hurt in September, and I think I was in bed a month or so.
Q. Were you in bed upwards of two months?
A. September and October. Yes; I think I was.

Q. When did you first get out?
A. I do not know. I did not keep any account.
Q. As near as you can rec-llect.
71 A. I cannot say.
Q. Do you remember when you first got up?
A. No, sir.
Q. Do you remember when you first got out of the house?
A. No, sir.
Q. Did you get out of the house before that next spring?
A. Yes, sir.
Q. Were you out that fall?
A. I cannot tell exactly the dates.
Q. Weren't you out before the first of January?
A. I was out on my crutches awhile, and then I would have to go to bed again, but I got out as soon as I could.
Q. Of course you did. Did you go across the river before the first of January?
The WITNESS: Before the first of January?
COUNSEL: Yes.
A. I do not recollect.
Q. What is your best recollection about it?
A. I cannot tell.
Q. Can't you recollect whether when you got out of your house you went across the river—whether you went across the river before January 1st of the following year? You were injured in September, you will remember.
A. I do not recollect anything like that.
Q. Do you mean to say that you cannot recollect when you first got out of the bed; how long it was after you were injured, or that you cannot recollect when it was when you first went out of the house; that you cannot recollect when you first went across the river
72 after you were hurt? I do not want the day of the month. I want you to give me some idea.
A. No, sir; I might recollect something.
Q. I will ask you this: Do you remember meeting on your wharf in November, after you were taken sick, when you had just come back from across the river, the elder Mr. Grimes?
A. I do not recollect of meeting old Mr. Grimes anywhere.
Q. Do you recollect of coming across the river?
A. I do not.
Q. Do you recollect of going across the river between the time you were hurt and the 1st of January?
A. I do not.
Q. Will you say that you did not go across the river to the best of your recollection?
A. No, sir; I won't say that.
Q. Will you say that you did not leave your house from the time of the injury until the following spring?
The WITNESS: That I did not leave my house?
COUNSEL: Yes. Will you say that?

The WITNESS: That I did not leave my house from the time I was injured until the following spring?

COUNSEL: Yes.

The WITNESS: What do you call spring?

COUNSEL: April, May, or March.

A. I left my house before May.

Q. Before April?

A. I was up here in town February 19th.

Q. That was before the spring?

A. I have that date. I know that positively. I have the date when I came up to see Dr. Lincoln at that time.

73 Q. Was that the first time you were up in town?

A. I know that to be a positive fact, because I have the date.

Q. You do not know whether the first time you came to town after you were hurt was the time you came to see Dr. Lincoln or not?

A. You can press me all you desire to, Mr. Wilson, but I am not going to guess at anything. When I have a date to go by I am going to swear by it.

Q. I am only asking you——

A. There is no use in asking me such a question, because I do not recollect positively.

Q. Then you cannot say so?

A. I know nothing of the sort. If you can bring me anything to show——

Q. I have no doubt you want to tell your story in your own way without my questioning you at all. Perhaps that would suit you better.

A. No, sir; not at all.

Q. My question is a perfectly proper one and a clear one. I want to have the best of your recollection in regard to these things. I want to know what, according to the best of your recollection, was the first time you came to Washington after you got hurt.

A. I have a date here that makes me positive that I was here on or about February 19th.

Q. I ask you if, according to your best recollection, that was the first time you came to Washington after you got hurt.

74 A. I could not tell you. I could not say positively yes or no.

Q. I want to ask you when, according to your best recollection, was the first time you left your house and went down to your wharf after you got hurt.

A. That I could not tell you; but I can tell you the first time when I did go down there. It was to meet the Mattano. What date that was they can tell. I went out on my crutches on the scow. I did not take note of the time.

Q. Was that in the fall?

A. It was just as soon as I could get out of the house.

Q. That does not mean anything.

A. I cannot tell the date.

Q. Can you tell whether it was in the fall?
A. Yes, sir; it was in the fall.
Q. That fall?
A. Yes, sir.
Q. Before the first of January?
A. Yes, sir; I think it was before the 1st of January. It was on or about the first time I could get out of the house. The party I saw was on the Mattano.
Q. When, according to the best of your recollection, was the first time you went across the river?
A. I do not recollect of going across the river at all.
Q. If you do not recollect it just say so.
A. I do not recollect it.
Q. According to the best of your recollection, did you go across the river? Your mother lived across the river?
A. Yes, sir.
Q. And your brother?
A. Yes, sir.
75 Q. Now, according to the best of your recollection, did you go across the river?
A. I do not recollect.
Q. You have been there since, I suppose. According to the best of your recollection, did you go across the river before the 1st of January?

Mr. BIRNEY: I submit that this inquiry has been made a dozen times of this witness.
Mr. WILSON: And a dozen times he has evaded answering it. I only want him to say yes or no. I simply want an answer to that question.

Q. State whether, according to the best of your recollection, you did not leave your house and go across the river before the 1st of January of the following year.
A. I have no recollection of it. I recollect of going down. The first trip I made down there was to see the Mattano.
Q. That is the best answer you can make?
A. Yes, sir.
The COURT: You can say you do not recollect if you do not. I could say that in a very little while if I was on the stand.
A. I do not recollect it.
Mr. WILSON: Why didn't you say so at first?
Q. In regard to what occurred when you were taken on shore, who did you say were with you and took you ashore?
A. A young man by the name of Scott and another by the name of Alexander—colored men.
Q. Do you remember when this case was tried before?
A. Yes, sir.
Q. Do you remember of being asked whether Mr. Carpenter
76 took you ashore?
A. Yes, sir.

Q. Do you remember of saying that you did not recollect whether he did or not?

A. I do not remember that.

Q. Do you remember now that he did?

A. Yes, sir; he took me ashore.

Q. Do you remember when your wife came down to the boat when you got ashore?

A. Yes, sir.

Q. Do you remember what Mr. Carpenter said then?

A. I remember what my wife said.

Q. Do you remember what you said?

A. Yes, sir.

Q. What did you say?

A. In answer to my wife's question?

Q. No; I asked you what you said.

A. I told my wife not to abuse Webb. She was abusing him.

Q. What else did you say?

A. I told her not to abuse Webb; he was doing all he could for me.

Q. Is that all?

A. Yes, sir.

Q. Did you say at that time to your wife, "Don't abuse Webb," or "Don't blame Webb; it was all my own fault," or words to that effect?

A. No, sir; I just said what I told you I said.

Q. Did you at that time and at that place say to your wife, "Mony, don't blame Webb, it is my own carelessness," or
77 "it is my own fault," or words to that effect?

A. No, sir.

Q. You said nothing like that?

A. I have said what I have just repeated.

Q. "Don't blame Webb?"

A. "Don't abuse Webb."

Q. That is all?

A. Yes, sir.

Q. You have known Webb a good many years, hav-n't you?

A. Yes, sir.

Q. You have been on very friendly terms with him?

A. Yes, sir.

Q. You were on friendly terms with him that day?

A. Yes, sir.

Q. Do you know Mr. George Grimes?

A. I do.

Q. Where does he live?

A. There is a farm between him and my farm, about a mile from me.

Q. Do you remember of receiving a visit from him the day after the accident?

A. I remember of his coming there.

Q. Where were you?

A. I was in bed.

Q. Did he come into the room?
A. Yes, sir.
Q. Do you remember what occurred?
A. Yes, sir.
Q. Do you remember his asking you how the accident happened?
78 A. No, sir.
Q. You do not?
A. No, sir.
Q. Did he ask you how the accident happened?
A. He did not.
Q. What did he say?
A. He said merely, "Good morning. How do you feel? Here is your money."
Q. Did he come to pay you some money?
A. Yes, sir; I wrote to him asking him to come and pay me what he owed me.
Q. What day was that?
A. I think Sunday.
Q. What day was it the accident happened?
A. Saturday, I think.
Q. And this was the next day, Sunday?
A. Yes, sir; I think it was the next day.
Q. What time was it?
A. About 12 o'clock.
Q. About the middle of the day?
A. Yes, sir.
Q. You do not remember his asking you to tell him how it happened?
A. No, sir; he never asked me how it happened.
Q. You do not remember of having any conversation with him about the accident at all?
A. That is all the conversation I had with him.
Q. You are positive about that?
A. Yes, sir.
79 Q. Did you tell him at that time when he inquired of you about the accident or did not inquire of you about the accident—did you tell him there on that Sunday or the following Sunday that the accident happened through your own fault?
A. No, sir.
Q. Nothing of that sort?
A. No, sir.
Q. Did you tell him nobody was to blame but yourself?
A. No, sir.
Q. Did you tell him the steamboat was not to blame?
A. No, sir; he never asked me a question as to who was to blame, or anything of the sort.
Q. Did you say anything about your own carelessness?
A. No, sir.
Q. Nothing at that time or at any time to him about your own carelessness having caused this injury?

A. No, sir; that is the only time he ever came to see me.
Q. Do you know Mr. Richard Grimes, his son?
A. Yes, sir.
Q. At that time or within a few days of that time do you remember of giving Mr. Richard Grimes an account of the accident and explaining as to how it happened?
A. No, sir; he was never there but that time; he and his son came together.
Q. And you did not say to Mr. Richard Grimes, his son, at that time or at any other time that the accident happened through your own carelessness and that Carpenter was not to blame?
A. Nor, sir.
Q. Nothing of that kind?
80 A. No, sir.
Q. Do you know Mr. Newton?
A. Yes, sir.
Q. What is his first name?
A. There are four or five of them down there; to which one do you refer?
Q. To Mr. Charles Newton.
A. Yes, sir; I know him very well.
Q. Where does he live?
A. There is a farm between his and my farm; he is a tenant of Mrs. Lewis.
Q. Did you say to Mr. Charles Newton about the time the accident happened, a day or two or two or three days afterwards, at your house, that the accident happened through your own fault and that you could not expect to recover anything for it?
A. Mr. Charles Newton never was inside of my house.
Q. Never was inside of your house?
A. No, sir; never in his life.
Q. You are on friendly terms with him?
A. Certainly; he is a nice man.
Q. Did you see him shortly after the accident?
A. No, sir; I do not know that I ever saw him after the accident until I got to moving about.
Q. When was the first time you saw him?
A. That I do not know.
Q. After the accident I mean.
A. I do not know anything about that. I do not know that I ever saw him at all after the accident. He never visited my house.
Q. Do you know Mr. D. W. Grimes?
A. Yes, sir.
81 Q. Do you remember shortly after the accident explaining to him how the accident happened and telling him it was through your own carelessness?
A. No, sir; I never said anything to him.
Q. You never said anything to him about that?
A. No, sir.
Q. You never said to him it was your own carelessness; that you put your foot where you ought not to put it, or words to that effect?

A. No, sir.
Q. Or that the company was not to blame?
A. No, sir.
Q. Nothing of that sort?
A. No, sir.
Q. You say you came to the city in February?
A. Yes, sir; I have a date in my book. I looked it up.
Q. Did you ever go to the office of the company at that time or at any other time and make complaint of the injury you had received?
A. No, sir.
Q. You never did?
A. No, sir.
Q. Did you ever make complaint to any of the officers of the company here in the city as to the injury you had received?
A. No, sir. Who do you call the officers?
Q. I mean the president or the agent at the wharf?
A. No, sir; I never saw any of them at all.
Q. When did you first make any sort of complaint or give any notice to the officers or the representatives of the company at the wharf or at the office of the company anywhere or on the
82 boat that you claimed to have been injured by the act of the company?
A. I do not know whether it was made by Mr. Birney or Mr. Mason.
Q. I am speaking now about your own accident.
A. No, sir; I never did anything. I never saw anybody at all about it. I never myself saw any of the company.
Q. This accident happened in September, 1883?
A. Yes, sir; September 15, 1883.
Q. And this suit was brought March 11, 1884?
A. Yes, sir.
Q. March of the following year?
A. Yes, sir.
Q. What had you done towards enforcing any claim against the company before you filed this suit?
A. I do not remember that I did anything; I do not know that I could have done anything. I never asked them for anything.
Q. You never asked them for anything?
A. No, sir; of course not. I never went to the company at all; I consulted a lawyer about it. I suppose Mr. Birney made the demand.
Q. You consulted Mr. Birney and then you brought this suit?
A. Yes, sir.
Q. Was it brought as a speculative suit?
Mr. BIRNEY: I object to that.
The COURT: What is the object of that question?
Mr. WILSON: I intended to follow it up, your honor, if the objection had not been so prompt, by asking the witness if a certain percentage or proportion was not, according to the agreement, to be paid for the prosecution of the suit.
83 Mr. BIRNEY: I object.

The COURT: Mr. Wilson, do you think that a proper question?

Mr. WILSON: I submit it to the court for the ruling of your honor. It has been ruled to be a proper question, and it has also been ruled by other courts not to be. I think the contrary has been ruled in Maryland, and I think perhaps in this court.

The COURT: I do not think it is a proper inquiry. Something of the sort might be asked if the persons who are to get a proportion of it were afterwards endeavoring to enforce their demand.

Mr. WILSON: It seemed to me it would be a proper question to ask the witness what proportion of what he might recover would go to the benefit of the plaintiff and what proportion to the benefit of some one else.

The COURT: I do not think it would be any more proper than for the other side to ask how much your fee is to be. It very often happens that such arrangements are necessary in order to enable an impecunious plaintiff to prosecute at all. I overrule the question.

(Exception reserved by Mr. Wilson.)

Q. You say the suit was brought by Mr. Birney without your ever having made any personal application or any complaint to the company of any injury that you had ever received?

A. No, sir; I just gave the thing up to Mr. Birney to attend to. I knew nothing about law or anything of the sort, and of course I was not going down there to talk to Mr. Thompson or anybody else to pay me.

Q. What is that?

A. I was not going to Mr. Thompson to ask him to give
84 me anything at all. I knew very well he wouldn't do it.

Q. You concluded without asking him that he would not give you $20,000?

A. Of course.

Redirect examination:

By Mr. BIRNEY:

Q. You caused two letters to be sent to the company?
A. Yes, sir.
Q. Who wrote the first one?
A. Mr. Mason.
Q. An attorney?
A. Yes, sir; in King George's county.
Q. Then, at your instance, I wrote the other?
A. Yes, sir.
Q. Did you receive any answer?
A. Yes, sir.

By Mr. WILSON:

Q. Who from?
The WITNESS: Did I receive an answer?
COUNSEL: Yes.
A. My attorneys received an answer.

Q. Have you it in your possession?
A. I expect they have it.

Mr. BIRNEY: I have it, if you want it; it is very brief.

By Mr. BIRNEY:

Q. There is one question I neglected to ask you when I was examining you in chief. Before the time of your injury how
85 long had you been engaged as a wharf agent, as you term it?
A. I went over across in Maryland, in 1871, where Mr. Rogers built my wharf, and from that time until I was hurt I have been attending to a wharf.

Q. How far did the boat go up the river after the injury?

The COURT: He spoke of that twice. Once he made a little different statement, but he answered the question first for you and then for Mr. Wilson. Before it stopped and went back, do you mean?

Mr. BIRNEY: Yes, sir.

The COURT: He answered a question of yours in his examination-in-chief and afterwards one of Mr. Wilson's on cross-examination in regard to that.

Mr. COLE: After he was injured?

The COURT: Yes.

Q. After it came back how did it come?
A. It rounded to and came back bow down.
Q. Why did it come back?
A. It had to come back after the freight—the freight that was left, the box and the demijohn. They had to come back for that, and then I hallooed to them to please come back. The passengers said they ought to come back. I lay on the wharf and they saw me, I suppose.

The COURT: He said in reply to you, referring to the question you asked awhile ago, that the boat went 400 or 500 yards and then returned. He made it 400 yards at the most in reply to Mr. Wilson's question.

The WITNESS: I am not positive as to the distance.

86 By Mr. BIRNEY:

Q. The boat then turned around and came back?
A. Yes, sir.
Q. Will you please exhibit your foot to the jury? I neglected to ask you to do so when I examined you in chief.

(The witness removes the covering from his foot and exhibits the same to the jury.)

By the COURT:

Q. What is your age?
A. I am forty years old.

87 The plaintiff, further to maintain the issues on his part joined, offered further testimony tending to prove that the

day on which the injuries complained of in the declaration occurred was clear and calm; that about twelve o'clock, noon, on said day the defendant's steamboat, John W. Thompson, came up the Potomac river and approached said Shamrock pier by way of the Virginia channel, which at that place is about parallel with the front of said pier, the tide being then strong flood and no wind blowing; that as said boat approached said pier no signal flag was given for her to stop; that it was customary for all boats coming up the river to stop at said pier without being signaled; that the said steamboat was passing the said pier parallel thereto at a distance therefrom, according to the testimony of one of plaintiff's witnesses, of about 100 yards; that when the stern of said steamboat was about opposite or a little above (a length and a half or two lengths above) the upper end of said pier said boat was stopped in consequence of the signals made by the plaintiff with his hands or arms while he was standing on said pier; that the pilot of said steamboat then left the pilot-house and went to the after part of the boat and stood on the upper deck over the after gangway, leaving no one in the pilot-house, and caused said boat to be backed down the river towards the wharf in order to make a stern landing; that while said boat was backing down the river as aforesaid (the pilot being still on the upper deck over the after gangway) that part of said boat at or near the after gangway struck the corner pile at the lower end of said pier with such force as to jar and alarm the passengers on said boat,
88 and to cause persons who were lying down on benches on said boat to roll off the benches, and with such force as to knock up three or four of the planks at the front of the pier and break off a piece of the front plank about four inches wide at the lower end and tapering to a point five or six feet from the said lower end.

That at the time said boat struck said pier the plaintiff was standing on said pier, near the front thereof, with a small basket on his left arm; that at the moment of collision the plaintiff cried out, "Oh, my God; I am all mashed up;" that said boat did not stop, and that the signal to go ahead was given just as the boat struck, and it immediately went forward; that according to the testimony of one of the plaintiff's witnesses, the purser of said boat, it was the force of the engine in backing that carried the boat against the pier; that according to the testimony of another of the plaintiff's witnesses it was the force of the flood tide carrying the boat upstream that caused the collision, and that according to the testimony of the same witness the collision occurred after the basket and demijohn had been put on board the boat and while the plaintiff and the mate were shaking hands or had hold of each other's hands.

And, further to maintain the issues on his part joined, the plaintiff produced as a witness Mrs. Toyer, who gave testimony tending to prove that she was an eye-witness to the infliction of the injuries complained of, being a passenger on said steamboat at that time; that the boat came with such force against the wharf as to break in the wharf, and that the plaintiff thrust his foot in between the planks; the broken planks came in and mashed his foot.

89 And, the further to maintain the issues on his part joined, the plaintiff produced as a witness Maria Small, who gave testimony tending to prove that she was an eye-witness to the infliction of the injuries complained of, being a passenger on said steamboat at that time; that the boat came up to the wharf very hard and broke in some of the planks, and that Mr. Tolson caught his foot in the planks—his foot got caught in the planks.

And, further to maintain the issues on his part joined, and to prove that it was negligent and unsafe for the defendant to attempt to make a stern landing under the conditions that existed at the time that said stern landing was made as aforesaid, and that the said stern landing was made in a negligent and unskillful manner, the plaintiff produced as expert witnesses Henry H. Hanie and Thomas Ross; and the said HENRY H. HANIE, being first sworn as a witness on behalf of the plaintiff, testified as follows:

By Mr. BIRNEY:

Q. What is your profession?
A. Steamboat man.
Q. Pilot?
A. Pilot and master.
Q. How long have you been engaged in that business?
A. For about 25 or 30 years.
Q. Have you navigated the Potomac?
A. Yes, sir.

90 Q. For how long a period?
A. On steam-vessels and sailing vessels pretty nearly all my life.
Q. How long have you been a licensed pilot?
A. About 25 years.
Q. Suppose a pier standing in the Potomac river some distance from the shore, a steamer coming up the river with a strong flood tide, without a wind; the steamer, having passed the wharf, desires to return to it, in what way should the landing at that pier be made to be safe and proper?
Mr. WILSON: I object to that.
The COURT: Where is the pier? What sort of a vessel is it; it may be the Great Eastern or a little steam-tug; or is the water deep?
Q. Do you know the John W. Thompson?
A. Yes, sir.
Q. Do you know the size and capacity of the vessel?
A. Yes, sir.
Q. Do you know the Shamrock pier?
A. Yes, sir.
The COURT: Now you are nearer to it.
Q. Adding those two facts to the question, suppose a steamboat like the John W. Thompson and a pier such as the Shamrock pier to be in existence, and the boat to pass the pier——
Mr. WILSON: How far? Let us get all the elements of this case.

Q. Pass the pier four or five boat's lengths, or thereabouts,
91 and desire to return to the pier, there being a strong flood tide and no wind, in what way should that boat make the landing in order to be safe and secure against accidents to pier or persons upon it?

The COURT (to Mr. Wilson): Do you object to that question?

Mr. WILSON: Oh, yes; I object to it.

The COURT: What is your objection?

Mr. WILSON: I do not think it established a case for the introduction of expert testimony. I do not think Mr. Birney has stated all the conditions that exist here and which should be embraced in such a question.

Mr. BIRNEY: If I have omitted any I would be happy to have them supplied.

Mr. WILSON: Put in your own conditions.

The COURT: I think the question forms a proper basis for propounding a hypothetical inquiry to an expert, but the conditions must be accurately stated or otherwise the whole thing loses its value. Therefore you should be very careful as to the facts. I do not think Mr. Wilson agrees with you as to the distance which the boat had passed the pier.

Mr. WILSON: No, sir; I do not.

The COURT: You are at liberty to take the statement of one of the witnesses.

Mr. BIRNEY: I desire to have my question conform to the testimony.

Mr. WILSON: My objection is that it does not locate the position of the vessel with reference to the wharf, either out in the stream
92 or up the stream. The testimony was that she was about half the width of the vessel from the wharf, and she was only about, I think, a boat's length, instead of four or five boat's lengths, as is stated in the question.

The COURT: Your question, Mr. Birney, stated three or four boat's lengths.

Mr. BIRNEY: That is my recollection of the testimony.

Mr. WILSON: There is quite a difference in the testimony of the various witnesses.

The COURT: Do you design to ask the witness in that question whether there was only one safe way of stopping at that pier?

Mr. BIRNEY: I ask him what was the proper and skilful way: the way in which a skilful landing would be made.

The COURT: Meaning there was a skilful way.

Mr. BIRNEY: Yes, sir; I think so. I wish to show the landing made in this instance was a dangerous landing, and one liable to injure the wharf.

The COURT: Is he competent to express an opinion on that subject? Let us ascertain whether *de* deems himself competent to express an opinion of that kind.

Mr. BIRNEY: It was with that end in view that I asked his opinion.

Q. Do you consider yourself competent to express an opinion on the proper way in which to make landings?

Mr. WILSON: We do not deny that he is competent to express such an opinion.

The WITNESS: Yes; I think I know how to land a boat there.

Q. Supposing the boat to have passed the wharf about -s length; to have passed it within about the width of the boat's length,
93 and have gone above it about a boat's length, and desired to make a landing at the pier, in which way should landing be made?

The COURT: That won't do.

Q. What would be the proper and skilful way of landing a boat at that wharf?

The WITNESS: The boat being nearly parallel with the end of the dock here, it might possibly be done by backing back to the dock, but if she was not parallel with the end of the dock the proper way would be to turn here (indicating).

Q. Suppose her head to have been at the time the landing is desired to be made—suppose her head to turn out from the dock towards the river.

A. Then I would have to back across the tide.

Q. Yes.

A. Then I would not ri*k*s it to land that way.

Q. Why not?

A. Because the tide, operating on the side of the boat, would fetch her against the wharf too heavy.

Q. What would be the possible consequence attending such a landing?

A. It might be done and without much damage, but it would be a little risky.

Q. A risky landing?

A. I should think so.

Q. What would be the proper way, with a strong flood tide, of landing at the wharf under the condition named?

A. The consequences might be serious and might not. A person might make a landing in that way without any damage.

Q. In what way?

94 A. By backing back to it.

Q. What would be the proper way under those conditions?

A. The most skilful way would be to turn the boat.

Mr. WILSON: I presume it is understood, your honor, that all these questions come in under our exception?

The COURT: Certainly.

The WITNESS: The most skilful way would be to turn the boat, under the circumstances, and make a landing against the tide if you can; in that reach particularly. The tide runs strong in that particular reach. If it is flood tide you bow down, and if it is ebb tide you bow up the river.

Q. Explain again why you think it would be dangerous to make a rear landing under such circumstances.

Mr. WILSON: That is mere repetition.

The WITNESS: As I said before, if I was backing across the tide, if it required me to go across the tide, I would be afraid to undertake it, but if I was backing back parallel with the end of the dock, square with the tide, I might risk backing back to it.

Cross-examination:

By Mr. WILSON:

Q. You know this Shamrock wharf?
A. Yes, sir.
Q. You stopped there very often?
A. Yes, sir.
95 Q. What kind of a wharf is it?
A. It is an oblong pier, something in this shape (indicating), with a small end out to the stream, and the end of it is not the proper landing. The proper landing is on either side of it. It is not built to make a landing on the end of it.
Q. Why not?
A. Because it is very narrow on the end, and the sides are formed for the landing of the steamboats there, to swing the stern in case the wind — on shore, or bow in if the wind is off shore, as the case may be.
Q. Have you ever landed there?
A. Yes, sir; often.
Q. Landed at the end?
A. Yes, sir.
Q. As well as at the sides?
A. Yes, sir; you can if it is calm weather. If it is blowing you cannot, safely.
Q. How does the channel run there with reference to the front of the wharf—straight?
A. About parallel with the end of the dock.
Q. You have frequently made stern landings yourself, on a calm day?
A. Yes, sir; in certain places.
Q. Nothing unusual about it?
A. No, sir; there are certain places you have to do it in. At Alexandria the tide there is such that you have to land with a stern landing, but you take care not to get below the dock to do it.

96 And the said THOMAS ROSS, being duly sworn, testified on behalf of the plaintiff as follows:

By Mr. BIRNEY:

Q. What is your profession?
A. I am at present captain of the steamer Wakefield.
Q. Is that a river steamer?

A. Yes, sir.
Q. How long have you been so engaged?
A. I have been captain of different kinds of boats about 35 years.
Q. Are you a pilot also?
A. Yes, sir.
Q. How long have you been engaged in river steamboating?
A. I commenced June 15th, 1880.
Q. And have been engaged in it ever since?
A. Yes, sir.
Q. Before that time where had you been?
A. In the ferry-boat business between here and Alexandria.
Q. Before that where had you been?
A. I was running a tug previously to that, from 1861, on this river.
Q. A steam-tug?
A. Yes, sir.
97 Q. Do you know the steamer John W. Thompson?
A. Yes, sir.
Q. Do you know the Shamrock pier?
A. Yes, sir.
Q. Suppose a steamer of the size of the John W. Thompson to have passed Shamrock pier or a pier like it, situated as it is—to have passed such a pier within the width of the boat and to have gotten about a boat's length beyond and above it, there being a strong flood tide and calm water, calm day, no wind, and the steamer to desire to make a landing at that pier—what would be the proper, skilful method of doing that?
Mr. WILSON: I object to that.
The COURT: What do you mean by that—the John W. Thompson?
Mr. BIRNEY: Yes, sir.
Q. What would be the proper way of landing the Thompson there?

Mr. WILSON: If your honor permits that question to be asked, I desire to reserve an exception.

(Exception reserved by Mr. Wilson.)

A. In attempting to land there it would be very unskilful management to let the boat get that much past the wharf. I would round about to and hit the tide.
Q. Would it be safe under such conditions to attempt a landing of the Thompson by backing her to the pier?
98 A. If the man at the wheel were to shift the helm as it should be, it could be done by very skilful action.
Q. It could be done?
A. Yes, sir.
Q. Would it be a proper way to attempt to land?
A. No, sir; not at that wharf.
Q. What would be the proper way?
A. To head the tide at that wharf at all times.

Q. Why?

A. The tide runs very strong there, and the wharf is right exactly at the edge of the mud flats, and to attempt to land any other way your boat would be apt to fly away from you, and you not be able to handle her very well.

Q. Suppose the head of the boat to be turned out into the stream; supposed the boat to have passed the pier in the way I have stated and to have her head out into the stream, would it be safe under such conditions to attempt to make a rear landing?

Mr. WILSON: I object to that.

The COURT: Objection overruled.

(Exception reserved by Mr. Wilson.)

A. In making the rear landing you have to turn the boat's head in the stream a little from the wharf, if we attempt to make that kind of a landing. In attempting to land in that way we have to throw her head out a little from the wharf—a very trifle, not too much—to keep it from striking hard.

Q. Would it be skilful management to back the boat partly below the pier so that the stern of the boat would be below the lower corner of the pier before landing?

99 A. You would have to back your stern. You could not make your landing without it.

Q. Under the conditions I have named, state whether that would be a skilful way of making that landing; whether it would be a proper way to land at that wharf.

A. If you attempted to land in that way at all, of course you would have to do it.

Q. Would it be proper to attempt to land in that way?

A. It is not a safe method of landing a boat at that wharf, anyway.

Q. The safe method is how?

A. To round to—head to the tide. That is the way I always land.

Q. Will you describe what would be the probable action of the tide upon a boat on any attempt to make a landing in that way?

The WITNESS: With the stern to the tide?

COUNSEL: With the head to the tide first.

A. We can handle the boat better and have more use of the rudder in that way. We have full control of the boat landing head to the tide, while with the stern to the tide we do not.

Q. Where should the pilot be at the time of making a landing?

A. Either the pilot or the captain should be in the pilot-house, and one or the other should be aft of the aft bell in making a stern landing.

100 Cross-examination:

By Mr. WILSON:

Q. I understand you to say you never make stern landings.

A. Very seldom at that wharf, or at any other wharf at that reach. The tide runs so strong we do not consider it safe.

Q. You have made them?
A. Yes, sir; when bound down; never when bound up. I have run the Wakefield two years, and on two occasions I have landed that way—bound down—to land passengers, and never bound up.
Q. You take freight on forward?
A. Yes, sir.
Q. You were never on the Thompson?
A. No, sir.

By Mr. BIRNEY:

Q. You have been on the boat?
A. On one or two occasions I have been on her.

By Mr. WILSON:

Q. You never were on her when she was in motion?
A. I never was employed on her, but I have been on board of her once or twice.
Q. You have never been on her when in motion?
A. No, sir.

By Mr. COLE:

Q. You have seen her in motion frequently?
A. Yes, sir.

101 And, further to maintain the issues on his part joined, the plaintiff offered testimony tending to prove that after the injuries complained of in the declaration were inflicted and on the same day a competent surgeon was summoned to attend to the plaintiff, who found that plaintiff's left foot from the instep to the toes was so badly crushed that it was necessary to amputate, and amputation was made of the three smaller toes and a part of the toe next the larger toe, and also a part of the sole of the left foot; that said injuries caused the plaintiff great pain and suffering and kept him confined to his bed about two months and prevented him from leaving his home for several months thereafter, during all of which time and afterwards and until the trial the plaintiff received and became *charg* chargeable for medical attendance in respect of said injuries; that the foot so injured has not been entirely healed and may never heal, but will always be subject to ulceration; that the plaintiff will never be able to walk any distance with comfort because of said injuries, which will be a source of inconvenience and distress to him as long as he lives; that said foot, although better than no foot or than a wooden foot and capable of being used to a considerable extent, is always liable to be used with pain and great deal of inconvenience, and he may have erysipelas in it, and that said injury has impaired to a great extent the plaintiff's ability to carry on his business as a farmer.

The plaintiff then rested his case, the foregoing being in substance all the evidence adduced in chief on his behalf.

102 Thereupon the defendant, to maintain the issues on its part joined, offered testimony tending to prove that said pier called

Shamrock was a temporary affair, constructed for defendant, of large piles driven into the bed of the river, the upper ends of which said piles were cut off to receive the four stringers that rested upon them; that upon said stringers, which were eight or ten inches square, rested the floor, which was composed of planks of oak or chestnut eight or ten inches in width and about two inches in thickness, laid parallel with the channel of the river at that place, and was nailed or spiked to the stringers; that the front line of the pier—that is, the end of the pier fronting the river and the Maryland shore—was about twelve feet in length; that the rear line of the pier or the end nearest the Virginia shore was about twenty-eight feet in length, and the other two sides, the upper and lower sides, were about twenty-eight feet in length; that at each of the outside corners of said pier were three fender or spring piles from fifteen to seventeen inches in diameter and in height about four or five feet above the level of the floor of the pier; that said piles were not fastened to the pier, but independent of it through contigious to it; that the lower corner pile rested in the crotch formed by the projection of the front stringer and the lower side stringer; that the next pile above said corner pile was distant from it about a foot and nine inches, and the pile on the lower side of the pier next said corner pile was about the same distance from said corner pile; the lower corner pile was close up against the flooring of said
103 pier, and the next upper front pier was one and a quarter inches from said flooring, according to measurement made Jan'y 2, 1886; that when anything was taken from said pier on board said steamer Thompson — it was desired that said steamer should make a landing at said pier it was usual for the plaintiff to hoist a flag or other signal on the staff over the shed on said pier, and when there was nothing to be taken from said pier the plaintiff would hoist no flag or signal.

That as said steamboat approached said pier on the morning of said 15th day of September, 1883, and until within ten minutes of the time at which said steamboat reached said pier the captain of said boat was with the pilot in the pilot-house; that as said boat approached said pier the captain, seeing no signal displayed for the boat to stop, left the pilot-house to go to dinner; that when and as the boat got abre-st of the pier the pilot saw the plaintiff run out on said pier and wave his hands as a signal for the boat to stop; that as soon as the boat's headway could be stopped, the said boat then being slightly above said pier, according to the testimony of one witness, the pilot gave the signal to back up, and, fixing the wheel in the becket so that neither the wheel nor the rudder could move, went to the after part of the boat on the upper deck, where there was a bell-strap communicating with the engine, and there remained standing over the after gangway, while the boat backed slowly and about parallel with the wharf until the center of the boat was about opposite or a little below the lower corner pile; that there was no person in the pilot-house from the time the pilot left it until the accident occurred; that the current or tide, which was
104 running about two miles per hour, then carried said boat

towards the pier; that as the boat approached the pier the plaintiff, having a basket on his left arm and a demijohn in his left hand, approached the edge of the pier and called to the mate, Webb Carpenter, stationed at the after gangway, and who was so prepared to throw or have thrown a line to make fast to the pier, "We don't want a line; I have got nothing but a demijohn and a basket," and reached forward and stretched out his left arm to the said mate of the said steamboat, who, standing on said boat inside the after-gangway rail, reached forward and took the said demijohn and basket from the left hand and arm of the plaintiff and deposited the same on the deck of said steamboat before the boat touched said pier, and then sung out, "All right;" that at that moment—that is, at the moment the said mate sung out "All right"—the boat was approaching, but had not touched, the said pier, and the plaintiff and the mate of said boat were shaking hands, or the mate had reached out and caught Tolson's left arm, and at the same time making some jocular remarks, and while they were so engaged the said boat struck the pier, but not with great or unusual violence, and the plaintiff's left foot was thereby caught and crushed.

One of defendant's witnesses, Capt. Gibbon, of the U. S. Army, testified that he was a passenger on said boat at the time the plaintiff was injured; that he was standing by the after gang on the lower deck, and was an eye-witness to the injury complained of; that as the boat was approaching the plaintiff's wharf on the day
105 the injury happened witness was on the upper deck of said boat; that he walked down to the lower deck and, seeing that the boat was going to land at the plaintiff's pier, stood to the left of the gangway about a foot and a half or two feet to the stern of the gangway; that as the boat neared the wharf witness saw the plaintiff standing or coming forward with a basket or demijohn in his hand and passed them to the mate of the boat, who was standing in the gangway; that as the plaintiff passed them to the mate the mate reached forward and the plaintiff reached pretty far out; that the boat was nearing the pier and they reached as far as the two men could reach, stretching themselves as far as they could; that the mate took the demijohn and set it down on deck, or possibly he handed it to some person and then took the basket; that after either handing the basket back or setting it down the mate reached forward and took hold of the plaintiff's hand; that while they were shaking hands the plaintiff was leaning towards the boat with his right arm around the upper front pile; that while they were shaking hands the boat was moving forward, and as it touched that pile the plaintiff made the remark, You have me fast—or, For God's sake, let go or let loose; that witness noticed that plaintiff was in distress and trying to get loose, as the boat pushed a little further backward, perhaps going past the pier two and a half or three feet or four feet; that plaintiff pulled his foot out from behind the pile; that the piles gave way and the plaintiff staggered back and dropped on the pier with his knee in his hand; that as the boat was moving

forward and before it touched said pier the witness stood ex-
106 actly opposite the upper front pile nexy above the *the* lower corner pile, leaning against a stancheon, a support of the boat which was above it, and as the boat moved forward a little, just beginning to come along, it dragged against possibly the lower corner pile, but witness did not notice that one until the piles began to creak when dragging against the next upper one and the pile going forward; that it was then the plaintiff made the remark about being fast; that witness recoiled a little from the pier; that at the time they or the boat had passed backward of the pile two or three feet until witness could see the pile give away, and he then saw the plaintiff draw his foot from behind the pile—that is, the crushed foot which was behind the upper pile; that witness did not notice exactly where said foot was before it was injured, but it was back of the pile; that plaintiff pulled his foot out after it was hurt from between the said upper front pile and said pier; that plaintiff's foot was crushed from above downward.

Another of defendant's witness, Henry J. Ennis, a patent attorney, gave testimony tending to prove that he was an eye-witness of the accident to the plaintiff, and at the time thereof was standing immediately over the after gangway on the deck above; that said boat was brought gently against said pier by the tide; that at the moment the boat struck the pier the plaintiff was standing between the lower corner pile and the next upper pile, with his right arm and leg around the corner pile, leaning forward; that witness looked
107 between the corner pile and the one next above it and saw that the plaintiff's left foot was in the floor of said pier, opposite the space between said piles; that plaintiff's position was not changed from the time he was seen by the witness in that position until he was hurt, and that plaintiff called out that he was hurt as soon as said boat struck the pier.

That said witnesses Gibbon and Ennis both testified that they were standing both together when they made the observations testified to.

And, further to maintain the issues on its part joined, the defendant produced as a witness on its behalf ALFRED RICHARDS, who, being duly sworn, testified as follows:

By Mr. WILSON:

Q. Please state your occupation.
A. Steamboating.
Q. How long have you been engaged in steamboating?
A. Fourteen years.
Q. What is your particular employment now?
A. At present I am not doing anything. The Mary Washington was the last steamboat I was on in September.
Q. Where were you in September, 1883?
A. I was employed as pilot of the steamer Thompson.
108 Q. Do you remember the accident at the Shamrock wharf in September, 1883, to Mr. Frank Tolson, the plaintiff in this case?
A. Yes, sir; I think I have some little knowledge about it.

Q. Will you state to the jury, if you please, where you were when the boat left Stewart's landing on the 15th of September, 1883, and where you remained until the boat made the landing at Tolson's?

A. I was in the pilot-house on the steamer John W. Thompson.

Q. You were pilot?

A. Yes, sir; when we left there there was a young flood tide.

Q. As pilot you were steering the boat?

A. Yes, sir; Capt. Kirby was in the pilot-house.

Q. When you say there was a young flood tide what do you mean by that?

A. First move of the tide setting up the river.

Q. Where did you notice that?

A. I noticed it at Stewart's wharf.

Q. How much of a flood tide was there at Tolson's when you got there?

A. It was about the same, only the tide getting a little stronger all the time.

Q. As you approached Tolson's wharf please state what occurred.

A. Just before we got there I looked for a signal. I did not see any. I guess it was eight or ten minutes before we got to Tolson's pier and Capt. Kirby went down.

109 The COURT: What did you say about the signal?

The WITNESS: I say I looked for a signal and didn't see any.

Q. How long before you got to Tolson's?

A. I judge about eight or ten minutes.

Q. You say Capt. Kirby went down?

A. Yes, sir. I got up abreast of the wharf. I saw Mr. Tolson run out to the wharf and wave his hand. Then the boat was in a position that I had to back her back and make a stern landing, as we always generally do at that time.

Q. The boat was going up the river. You were in the pilot-house, and you were coming up this way. Where was the boat when Mr. Tolson waved his hand?

A. It was about off here. In this direction above the wharf.

Q. About how far from the wharf?

A. I guess we were about fifty yards or more.

Q. Out in the river?

A. Yes, sir.

By Mr. COLE:

Q. Do you say fifty yards out?

A. Abreast of the wharf.

By Mr. WILSON:

Q. Then Mr. Tolson waved his hand?

110 A. Yes, sir.

Q. Where was he standing when he waived his hand?

A. Right in the middle of the wharf.

Q. Then what did you do?

A. I backed the boat back then and stopped her.
Q. How far did you back her?
A. I backed her below this corner (indicating).
Q. Below the corner out there (indicating)?
A. Yes, sir.
Q. And then what did you do?
A. I stopped the engine so that the tide could take her against the wharf.
Q. Did you make that landing at that time?
A. Yes, sir.
Q. Describe the motion of the boat as you came up to the wharf. First you backed down below the wharf?
A. Yes, sir.
Q. Then the tide took her in?
A. Yes, sir; just lapped the corner in that way (indicating); then she drifted around straight against the wharf.
Q. What did you see of Mr. Tolson as the boat got near the wharf? Did you see him leave the place where he was?
A. I saw him go back in the house and get a demijohn and basket.
Q. Where were the basket and demijohn?
A. Setting up against the side of the house.
111 Q. Right there?
A. Yes, sir.
Q. Then what did he do with his basket and demijohn?
A. I saw him have it on his arm and come and give it to Mr. Carpenter over the piles.
Q. Did you see him give it to Mr. Carpenter? And, if so, state in what way he approached the piles. Tell us where he came with the basket and demijohn.
A. He came right out here and stood right in the middle of these three piles.
Q. Then did you see what he had in his hands?
A. Yes, sir; a basket and demijohn.
Q. In which hand did he have the demijohn?
A. To the best of my knowledge, I think it was his left hand.
Q. And the basket?
A. I think he had them both in his left hand.
Q. Described how both the basket and the demijohn got from him to Mr. Carpenter.
A. Mr. Carpenter was up on the rail here (indicating), and reached his hand over, and Mr. Tolson reached his hand over. Mr. Carpenter took the basket from off his hand and laid it down and took the jug.
Q. Then what happened?
A. Mr. Carpenter said, "All right, Mr. Richards." The pilot always waits for the mate to say when he is done landing. I rung the bell and the boat started ahead.
112 Q. Then what occurred?
A. I did not know that Mr. Tolson was hurt until I was

informed that we were to go back to the wharf; that Mr. Tolson was hurt.

Q. Then you backed?

A. Yes, sir; I turned around. I was in a different direction from the tide, and then I landed. I was way above the wharf. I landed head down.

Q. What part of the boat touched the pile?

A. To the best of my knowledge, the boat landed right in there (indicating); on the lower corner pile.

Q. What part of the boat touched the pile first?

A. I think about ten feet beyond the aft gangway. She touched about there, to the best of my knowledge.

Q. Between the after gangway and the stern of the boat?

A. Yes, sir.

Q. What kind of a blow was it; how did she strike?

A. She did not strike any harder than I always strike wharves.

Q. Do you know about these piles there, whether they are fast to the wharf or whether they are movable?

A. I think these two were movable.

Q. Did they stand out from the wharf?

A. A little ways, not very much; just enough to pass your hand through. They were not fastened. I know that. They were supposed to be spring piles, but they were not.

113 Q. When you rang the bell to go ahead the basket and the demijohn had been taken on board?

A. Yes, sir.

Q. And Carpenter had hallooed out, "All right"?

A. Yes, sir; "All right, Mr. Richards." I was standing by the bell-strap, and I pulled the bell and walked on to the pilot-house.

Q. Did you hear Mr. Tolson halloo or say that he was hurt?

A. No, sir.

Q. You did not know he was hurt until afterwards?

A. No, sir; not until I backed.

Q. When you went back did you go onto the wharf?

A. No, sir; I think I stayed on deck. Capt. Kirby went ashore.

Q. What occurred on the wharf, do you know?

A. No, sir; I knew they took him ashore.

Cross-examination:

By Mr. COLE:

Q. You say you are doing nothing at present?

A. No, sir; not at present.

Q. How long have you been out of business?

A. Since the 28th of September I stopped. I have made one trip on the Thompson since the 28th of September for Capt. Jones.

114 Q. You say when you were about ten minutes from Mr. Tolson's wharf going up the river you looked for a signal, but did not see any?

A. No, sir.

Q. About how far were you from Tolson's wharf when you looked for that signal eight or ten minutes before you got there?

A. About a quarter of a mile; maybe more.

Q. You did not look at the wharf again after Capt. Kirby left you until you got up there and saw Tolson come out and motion for you?

A. When I got abre-st of the wharf I saw Mr. Tolson.

Q. You did not look at the wharf or take any observation from it until you got opposite and abre-st of it?

A. I kept looking for a signal all the time, and I did not see any, only by his hand when he came out, when the boat was abre-st of the wharf.

Q. You say the boat was abre-st of the wharf?

A. Yes, sir.

Q. Do you mean to say that the wharf was immediately opposite the center of the boat?

A. About the center of the pilot-house. We might have been a little beyond that; between the pilot-house and the wheel-house, the wharf was at the time.

Q. What position is the pilot-house on the boat?

The WITNESS: What position is it?

COUNSEL: Yes; I mean whether aft, forward, middle, or where.

115 A. Forward.

Q. What was the position of the pilot-house as to the wharf when you noticed Tolson come out and make his signal?

A. I was standing in the pilot-house steering the boat as we went by. I saw him facing the water.

Q. I mean how far above the wharf, if above it at all, was the pilot-house at that time? Had the pilot-house passed above the wharf?

A. Yes, sir.

Q. How much?

A. Nearly two-thirds of the boat.

Q. So that the rear of the boat, then, was about opposite the wharf at the time you saw the signal?

A. No, sir; the middle of the boat was by the wharf when I saw the signal.

Q. That was about opposite the wharf when you saw the signal?

A. Yes, sir.

Q. And the pilot-house was above the wharf?

A. Yes, sir.

Q. So that you had to look back in order to see the signal?

A. I saw him as I passed by the wharf when he came out.

Q. Do I understand you to say you commenced to back the boat as soon as you saw the signal?

A. As soon as they came out and told me. I had gotten a little bit above the wharf.

116 Q. As soon as who came out and told you?

A. I think Bob Vaughn, the baggage master. I think he came out and told me.

Q. Then you did not see the signal yourself at all?

A. I have never seen any yet, except by the wave of his hand; that is all.

Q. Did you see that? Did you or did you not see the signal?

A. I have told you I saw his hand.

Q. What caused you to stop the boat and back it? Was it from what what Bob Vaughn told you or what you saw yourself?

A. Of course I had to land the boat that way.

Q. How do you know that Tolson wanted you to stop at the wharf?

A. Because he waved his hand and said something about landing.

Q. Did you see him wave his had?

A. I did when we got abreast of the wharf.

Q. The pilot-house was somewhere above the wharf?

A. Yes, sir.

Q. You had to glance back?

A. Just a side glance like.

Q. Bob Vaughn didn't tell you to stop?

A. No, sir; not until after I left the wharf; not until after the man got hurt.

Mr. WILSON: You and the witness are talking about different occasions.

117 The WITNESS: He is asking me two questions at one time.

Mr. COLE: I am asking you about one time.

The WITNESS: All you have to do is to go on and ask and I will answer.

Mr. COLE: I suppose so.

Q. Before you landed the boat, however, at all—the first intimation you had that Tolson wanted the boat landed there was the signal from Tolson himself?

A. Yes, sir; from his hand. We always look for the signal, which is a small piece of muslin on a pole.

Q. You did not get that signal that time at all?

A. No, sir.

Q. You didn't get it generally at that wharf, did you?

A. I have always seen — on there ever since I have been running on the river.

Q. There has been one there probably, but it was not run up as a signal for you to stop generally?

A. Yes, sir; we always stopped at that signal. That is what I always looked for..

Q. That is not the question I asked you. I ask you whether generally, at that Shamrock wharf, the flag was run up as signal for you to stop.

A. I have stopped there by signal from the flag.

Q. You have stopped there by a signal from the flag?

A. Yes, sir.

Q. I have no doubt of that; but that is not my question. My question is whether, as a general thing, in passing that wharf you you were signalled by the running up of the flag.

118 A. Generally, when I was in the pilot-house.

Q. I want to know whether, as a general rule, in passing that wharf you were signalled to stop by the running up of a flag.

A. It has always been the rule since I have been on the steamboat.

Q. I am not asking what the rule is. I ask you what the practice was at that particular wharf; whether, in the transaction of the business, it was usual and general for Mr. Tolson to run up a flag there as a signal for you to stop.

A. It has been by me in landing a boat there. I do not know what his habits were.

Q. What signal have you looked for?

A. A piece of muslin on a pole.

Q. Did he generally run up that flag for you to stop?

A. He did for me to stop whenever I was in the pilot-house at the time he wanted us to stop.

Q. You never stopped there on any other occasion or because of the display of any other signal than the running up of the flag?

A. No, sir; I never did. Perhaps Capt. Kirby may have.

Q. I am asking what you did. Did you ever stop at that wharf before because of the display of any other signal than the running up of a flag?

A. No, sir; only by the running up of a flag, and that day by the waving of his hand.

119 Q. Will you give me a reason, if you can, why, on that particular day, you recognized the signal of the hand when you had never done it before?

A. I did it for his sake.

Q. How did you know, if that was not the signal for the stopping of the boat—if that was not the usual signal for the stopping of the boat how did you know, when he put his hand up, that he wanted you to stop?

A. He just said, I have a basket, or something. I overheard the conversation.

Q. Then you did not stop because of the signal, but because he called you?

A. Of course I did not see any other signal until I got back to the wharf.

Q. Did you stop the boat on that occasion because Tolson held up his hands or did you stop it because Tolson told you he wanted you to stop and had something to put on?

A. I went by the wave of his hand, of course.

Q. You did not hear him say anything until you got back to the wharf?

A. Only when I got close enough; that was when I could hear him. I heard him tell Mr. Carpenter that he had a few packages.

Q. You did not hear him say anything when he put his hand up and waved it?

A. No, sir.

Q. At that time you stopped at the signal of his waving his hand?

120 A. Yes, sir; it was for his benefit, of course; it gave me more trouble than it did him.

Q. There is no doubt about that; there is no doubt about its having given you a great deal of trouble, but what I *was* to get at is whether you did not stop on that particular occasion because of the signal of the hand.

A. Yes, sir.

Q. That was all you had to indicate to you that Tolson wanted you to stop?

A. I stopped at that landing that day because of the signal of his hand.

Q. And that was the first time you ever did it?

A. Yes, sir.

Mr. COLE: It took us a great while to get around to that.

Mr. WILSON: Yes; it did take you a long while to find that out.

Q. How many feet was the pilot-house above the upper corner of the wharf when you started to back the boat?

The WITNESS: When I started to back the boat to make the landing?

COUNSEL: Yes.

A. I was about a length away.

Q. I do not ask you how far you were away from the wharf, but I want to know how far the pilot-house was above the upper end of the wharf at the time—up the river?

A. The boat is 170 feet long, and, I suppose, about 30 or 40 feet forward, deck off; you can judge how far the pilot-house
121 was from the corner of the wharf.

Q. Was the pilot-house 30 or 40 feet above the upper corner of the wharf?

A. Yes, sir.

Q. How far was the boat out in the river from the wharf?

A. I judge it was about as far as from here to that middle window at that time.

Q. Where was Tolson at the time he signalled to you? Taking this now (indicating) for the point, tell us the relative position of the wharf at the time he signalled to you.

A. He was standing in the middle of the wharf between there three piles.

Q. Was he back?

A. He was about the center of the wharf.

Q. Where did Tolson go when he left that position?

A. He walked from the middle of the wharf back to the warehouse and picked up these two packages.

Q. Then where did he go?

A. Then he came out to this corner between these three piles.

Q. You saw him do that?

A. Yes, sir.

Q. You saw him leave the center of the wharf where he was when he signalled you?

A. Yes, sir.

Q. You saw him go back to the little house that was on the rear

of the wharf and get the basket andthe demijohn and walk out to the lower corner of the wharf by these piles?

122 A. Yes, sir.

Q. When he got to the corner where the piles were where was the boat?

A. The boat was lying right against the corner like that (indicating).

Q. Did the boat get there about the same time Mr. Tolson did?

A. I think the boat was lying against the pile before he got out there. It had just about touched the wharf.

Q. Then do I understand you to say that Mr. Tolson stood still in the center of the wharf until you got the boat up to it, and after you got the boat up to it he left his position; went and got the things and came there, or did he do that while you were getting the boat around?

A. He went from the center of the wharf when I went back to back the boat.

Q. Then he went from his position at the center of the wharf and got the things; went out to the piles while you were getting the boat around?

A. Yes, sir; I think half a second before he got there; when he stood there he had some words with Mr. Carpenter. I did not understand them exactly.

Q. I am not after the words. I want to get at your movements and his just at the present time. You were getting the boat around while he was leaving his position in the center of the wharf and getting the things and going out to the piles, where he handed them over?

A. Yes, sir.

123 Q. You saw him all the while he was doing that?

A. I was aft then. I could not help seeing him.

Q. The pilot-house was in front. What were you doing there?

A. I wanted to land aft at that time.

Q. Do you mean to say you were not in the pilot-house while you were making that landing?

A. No, sir; it was not my place to be there at that time.

Q. Where were you?

A. I was back aft of the paddle box, to pull the bell-strap.

Q. The paddle box is on the aft part of the boat?

A. About midships.

Q. And you were in the rear of that?

A. Yes, sir.

Q. Is there anything there by which you could at all govern or control the motion of the boat?

A. With the bell-strap I could control the engine; the boat was in position, too, and with the tide then.

Q. But there was no means by which, from the position you occupied there, that you could communicate any motion to your wheel in your pilot-house?

A. I fixed the wheel in the becket when I left the wheel.

Q. Was there anything where your position was by the paddle

box, as you call it, by which you could communicate any motion or by which you could move your wheel in the pilot-house?

A. I left the pilot-house because I did not need any steering at that time.

Q. I don't want to know whether you needed any steering or not. We will get to that part after awhile; but you could not com-
124 municate with your wheel from the position you were, could you?

A. No, sir. I couldn't steer the boat from there.

Q. Nor could you control the movements of the boat by means of your wheel from where you stood?

A. I could control them by the bell-strap of the engine.

Q. You could control the engine, but you could not control your wheel?

A. It didn't need any control; the wheel was already fixed.

Q. You stayed there by the paddle box how long?

A. About five or six seconds.

Q. Did you stay there until the boat struck the wharf?

A. Yes, sir. I was there when she drifted up against the wharf.

Q. When she drifted up against it then?

A. Yes, sir.

Q. How long did your remain there by the paddle box after it drifted up against the wharf?

A. Long enough for Mr. Tolson to have the things aboard, and Mr. Carpenter told me, "All right; to go ahead."

Q. You waited for that signal?

A. I always do.

Q. Then you rung the bell for the engine to move?

A. Yes, sir.

Q. And then you started forward to your pilot-house?

A. Yes, sir.

Q. Where were you when you learned that Mr. Tolson has been injured?

A. In the pilot-house.

125 Q. You had gotten back to the pilot-house?

A. Yes, sir; three or four lengths away from the wharf the boat might have been.

Q. How did you learn that Mr. Tolson had been injured?

A. By the baggage master.

Q. What did you do then?

A. I circled the boat around and came back to the wharf.

Q. Did you do that without any orders from anybody?

A. The captain's orders.

Q. Captain who?

A. Captain Kirby.

Q. How did you get that order from him?

A. By the way of Mr. Bob Vauhgn.

Q. He brought you the order?

A. Yes, sir.

Q. Did he bring you the order to do that at the same time that he informed you that Tolson had been injured?

A. Yes, sir—that is, when I asked him what he wanted to go back for; and then is when he told me he thought Mr. Tolson was hurt.

Q. When you first got to the paddle box where was the boat—I mean with reference to the wharf? You left the pilot-house when you concluded to make your rear landing?

The WITNESS: Do you mean the first landing I made?

COUNSEL: Yes; the first landing; when you left the pilot-house and went back to the paddle box to make your first landing—your rear landing. When you got to the paddle box what was the
126 relative position of the boat as to the wharf?

A. Just about that (indicating). She was backing in this direction (indicating).

Q. She was backing across the channel?

A. Not across the channel, but about lapping the tide.

Q. What do you mean by that?

A. About quartering with the tide.

Q. How near was the rear part of the boat which struck the wharf to the wharf at the time you got there?

A. She appeared to be just like my hand, going up in this way (indicating).

Q. How great a space between this pile here (indicating) and the side of the boat?

A. Fifty feet, maybe; I could not say.

Q. Did you notice where Mr. Tolson was then?

A. He was up at the warehouse then.

Q. Getting his things?

A. Yes, sir.

Q. Did he walk right down?

A. He came out from there with the things in his hands. I think the boat must have touched the wharf a little before he got between these piles. It may have been probably about the same time; I could not say.

Q. What do you say his position was when he handed the articles to Mr. Carpenter?

A. He was standing right in here between the three piles.

Q. He could not have stood between the three very well.
127 A. What I mean is in the center here (indicating).

Mr. WILSON: You say he could not have been between the three?

Mr. COLE: No; I don't see how he could very well.

The WITNESS: He was between these two piles right here.

Q. He stood behind this one?

A. Yes, sir.

Q. Did he hand both of those articles at the same time—both the jug and the basket?

A. He handed the jug first, I think, to the best of my knowledge.

Q. And the basket afterwards?

A. Yes, sir.

Q. Where was the basket when he handed the jug?

A. I think it was hanging on his wrist; somewhere between there and his elbow.

Q. Which hand did he deliver it with?
A. To the best of my knowledge it was his left hand.
Q. What was he doing with his right?
A. He must have been standing there steadying himself.
Q. Not what he must have been, but what you saw. I just want to know what you saw and what you distinctly remember.
A. That is all that I am telling you.
Q. I only state that because you said in your former answer "he must have been." Do you know what he was doing with his right hand when he was delivering those articles with his left?
A. No, sir.
128 Q. You could not say where it was?
A. No, sir.
Q. You could not give his exact position?
A. No, sir.
Q. He stood in around those three somewhere?
A. Yes, sir; right here in the center between these three piles.
Q. Do you remember to be understood as saying that he stood between these two?
A. He handed the articles over this corner pile.
Q. The boat struck the corner pile?
A. It came up against these two piles.
Q. Against this one and that one?
A. Yes, sir.
Q. The two outer and lower piles?
A. Yes, sir.
Q. This pile and that one—the corner pile and the one on the side here?
A. Yes, sir.
Mr. WILSON: The one on the front?
Mr. COLE: No; the one on the side, he says.
The WITNESS: The boat struck between these two piles (indicating); lapped the corner of these two piles.
Q. Which one of the piles did the boat strike first?
A. She must have struck these two here (indicating).
Q. Struck both at the same time?
A. Struck that one first (indicating).
129 Q. Corner pile?
A. Yes, sir.
Q. She struck the corner pile first?
A. Yes, sir; because in her position she could not touch this one (indicating).
Q. Then she swung around and struck the front pile?
A. Yes, sir; just swung around gradually.
Q. And struck the front pile?
A. Just laid against it.
Q. Did it strike this one (indicating), one of the piles on the upper corner?
A. No, sir; did not touch those at all.
Q. Did it touch this upper pile here before or after Mr. Tolson handed the articles on; you can tell that?

A. I guess I was about midway of the boat——

Q. I want to know whether you can tell me whether she struck this upper pile before Mr. Tolson handed the things on or afterwards?

A. She was laying against the piles when he handed the things over.

Q. She had already struck and was lying against them when he handed the things on?

A. Yes, sir.

Q. He handed them on and shook hands with Carpenter?

A. That is what I heard; I did not see it.

Q. Do you remember anything about whether they shook hands or not?

A. I heard something said, and then Carpenter said, "All
130 right, Mr. Richards." I did not wait there to see what happened. I went on to the pilot-house, and when I got to the pilot-house I do not suppose the stern had passed that wharf.

Q. You are sure the boat had come to a standstill and was laying up against those piles before Mr. Tolson handed these things over?

A. Just before he handed them over. (It might have happened at the same time he got there.)

Q. After Mr. Tolson had handed them over you heard him and Carpenter speak to each other?

A. Yes, sir.

Q. You heard Carpenter say all right, and you rang the bell?

A. Yes, sir.

Q. You heard no expression from Mr. Tolson while you were there that he was injured?

A. No, sir.

Q. The first you heard of it was after you got up to the pilot-house and got two or three boat-lengths out into the water?

A. Yes, sir.

131 Capt. RICHARDS recalled.

By Mr. WILSON:

Q. I forgot to ask you how you would fix the wheel when you left the pilot-house?

A. The wheel is starboard in the becket.

Q. Just explain that to the jury.

A. You put the wheel starboard in the becket——

Q. You fix the wheel so that it would not move and so the rudder would not move?

A. Yes, sir; threw the rudder port and the wheel starboard.

Q. What is that that you call the becket?

A. A little piece of rope in the middle of the floor.

Q. And that you hook on to one of the spokes?

A. Yes, sir.

Q. And then the wheel is fast and the rudder cannot move?

A. Yes, sir; that is it.

132 Cross-examination:

By Mr. COLE:

Q. The effect of fixing it in the position in which you left it was to throw the stern of the boat around towards the wharf?

A. Certainly.

Q. So that if any force had been put upon the engine while that rudder was in the position you left it the tendency of the force applied to the engine would have been to throw the stern of the boat around towards the wharf?

A. When she was backing. If the engine had gone ahead it would have thrown it away from there and she would have not touched the wharf.

Q. As long as the engine was backing the tendency of the rudder was to throw the stern of the boat around towards the wharf?

A. Yes, sir.

Q. And you left it in that position?

A. Yes, sir; the boat was stopped still when I got back abre-st of the wharf.

Q. I suppose there is a way to communicate with the engine-room from the pilot-house?

A. Yes, sir; through a speaking trumpet.

Q. You could speak to the engineer?

A. Yes, sir.

Q. Cannot you communicate with him by a bell from the pilot-house?

A. Yes, sir.

133 Q. And by a speaking tube?

A. Yes, sir.

Q. So that it was not necessary at all for you to leave the pilot-house and go back where you did in order to communicate with the engineer by bell or any other way? You could have communicated with him from the pilot-house?

A. If I was going to make a landing at that end.

Q. That is not my question. Cannot you communicate with the engineer from the pilot-house?

A. I can.

Q. Cannot you tell him anything you want him to know from there?

A. Yes, sir.

Q. There is no order that you may want to give to him—nothing that you may want him to do with his engine, either to reverse it or to go forward or to take off steam or to put on steam—that you could not communicate with him from the pilot-house in regard to?

A. No, sir.

The COURT: Which is the next landing that you made above Shamrock wharf?

A. Smith's Point.

Q. That is in Maryland?

A. Yes, sir.

Q. If you had been going from Stewart's to Smith's Point, not intending to stop at Shamrock, which way would you have gone?

A. I would have gone about three-quarters of a mile distance away from there.

134 Q. You would have gone up the main channel?

A. Yes, sir.

Q. Then you were prepared to stop at Shamrock, if it was necessary, from the course you were making?

A. Yes, sir; certainly.

By Mr. WILSON:

Q. That was the object of the signal—the white signal—so that if they saw it in time they could stop?

The COURT: They did not see it?

Mr. WILSON: No, sir; I say they did not see it.

The COURT: He saw no signal, but he nevertheless came in.

135 And, further to maintain the issues on its part joined, the defendant offered testimony tending to prove that said pier was not broken in or its planks torn up by said collision, and that after said injuries were inflicted on the plaintiff the said boat turned about and made a bow landing at said pier for the purpose of rendering the plaintiff assistance, and the plaintiff was taken ashore from said pier to his landing, and then and there, in the presence of said mate, Webb Carpenter, and others, said that he was hurt by his own fault; that he was standing in a dangerous position; that the morning after said injuries were inflicted the plaintiff, at his own house, explained to two of his neighbors how said accident happened, and said to them that it was his own fault and nobody else's; that he did not blame any of the boat people; that after he handed the basket of eggs and the demijohn to the mate, Webb Carpenter, he took Webb by the hand, or Webb took him by the hand, and said "Come on, old boy; come and go up with us," and he, the plaintiff, replied "No; I can't go;" that the boat had then started; that the basket and demijohn had been delivered and the bell had rung for them to go ahead, but, unfortunately, one of the piles—a loose pile—flew back and caught his, the plaintiff's, foot; that he was leaning forward over the bunch of piles on the east or southeast corner of the wharf, the lower end of the wharf, and shaking hands and sky-larking with the mate, telling him to come on and go up the river, and he saying that he could not go up that day, and in the meantime the pile flew back and caught his foot and crushed it.

136 And, further to maintain the issues on its part joined, the defendant produced as witnesses on its behalf Charles W. Kirby, the captain of said steamboat, and Alfred Richards, the pilot, who gave testimony tending to prove that it was not a negligent or unsafe thing for said boat, under the circumstances existing at that time, to endeavor to make a rear landing; that it was not a negligent thing for the said boat to fail to stop at said wharf or to have stopped and made fast at said wharf at the time aforesaid; that it

was not a negligent thing for the pilot to leave said pilot-house, as said boat was making a rear landing as aforesaid, and that said boat did not make said rear landing in a violent manner.

And, upon cross-examination of one of the defendant's witnesses and an officer of said steamboat, testimony was given tending to prove that at the time of said landing said steamboat was pressed for time and had been so pressed for time all day, and that the purpose of making a stern landing instead of a bow landing was to save time. It was also shown in the evidence that, within two or three days after said occurrence, the captain, pilot, baggage-master, and purser of said boat, the first three of whom testified as witnesses for the defendant in this cause and one of whom testified as a witness for the plaintiff, signed and delivered to the superintendent of the defendant a paper in words and figures as follows, which was read over and assented to by them before they signed, viz:

To the president and board of directors of the Inland and Seaboard Coasting Company:

137 "I, Charles W. Kirby, master of the steamer John W. Thompson, her engines, boiler, tackle, apparel, and furniture, do hereby report in manner and form following—that is to say:

That heretofore and on or about the — day of September, 1883, the said steamer being on her return trip from Leonardtown, in the county of St. Mary's, in the State of Maryland, to the city of Washington, D. C., the time being between the hours of twelve noon and three o'clock in the afternoon of said day, a casualty occurred at a wharf known as 'Shamrock,' whereof one Frank Tolson is the owner or agent, said casualty being entirely due to the contributory negligence of the said Frank Tolson, as follows, to wit: The said steamer, having made a landing at Stewart's wharf, was pressed for time, and there being no signal exhibited had passed said Shamrock; thereupon said Frank Tolson appeared upon said wharf and beckoned for said steamer to return thereto, indicating that he had freight for her. The course of said steamer was then so altered as to make a stern landing at said 'Shamrock,' *the* which was done with due care and diligence; but said wharf, being built upon piles in the open river and having no shore support, is necessarily insecure and unsubstantial; and inasmuch as said Frank Tolson carelessly and negligently stood with his right foot resting upon a slight plank between two of the piles whereon said wharf is built when said steamer pressed upon said wharf, the tide then being at about full flood, the said two piles were brought into conjunction and the right foot of said Tolson was maimed and injured; that immediately upon the extent of the injuries of the said Tolson being made known
138 to the subscriber he caused all possible care and attention to be shown to him, putting him ashore in one of the boats of said steamer and supplying him with necessary bandages, &c., and

that said Tolson at said time and immediately — said casualty exonerated said steamer and her officers from all blame in the matter.

All of which is respectfully submitted.

CHAS. W. KIRBY, *Master, &c.*

Attest: ALFRED A. RICHARDS.
R. A. VAUGHN.
T. B. CROW."

And, further to maintain the issues on its part joined, the defendant produced as expert witnesses Columbus D. Bonneville, J. Beecham, and the said Henrie H. Hanie; and the said BONNEVILLE being sworn, testified as follows:

Q. What is your occupation?
A. I am a mariner.
Q. How long have you been a mariner?
A. Since 1862.
Q. What experience have you in the navigation of the Potomac river?
A. I have had about 12 years' steady steamboating.
Q. In what capacity?
A. I have been wheelman, first mate, second mate, pilot, and captain.
139 Q. What are you captain of now?
A. I am not captain of anything. I am not in the steamboat business.
Q. What was your last vessel?
A. My last vessel was the Woodwroth; about a month ago.
Q. Where?
A. Fortress Monroe.
Q. What vessels have you commanded on the Potomac?
A. The Lady of the Lake and Jane Mosely.
Q. The Leary?
A. No, sir.
Q. Did you hear the testimony of Mr. Richards to-day in regard to the landing of the Thompson at Shamrock wharf?
A. I did.
Q. Will you state, if you please, whether in your opinion the landing as made and described by Mr. Richards was a reasonably proper and safe one under the circumstances? First, I will ask you if you know the steamer John W. Thompson.
A. Oh, yes.
Q. You have been aboard of her and know her capacity and length?
A. I know her perfectly well, although I never was employed on her.
Q. Now you can go on. Do you know the Shamrock wharf?
A. I have never traded at that wharf. That is about the only wharf on the river that I never used to stop at. I never traded there. I know where it is.

140 Q. You can now go on and answer my question.

A. Well, in going up to a wharf with the tide, calm weather, I always make a stern landing, unless I have something heavy to put aboard. Whenever I have anything small, packages and such like, I make a stern landing. In case I do not get signal in time to make a bow landing I always make a stern landing. In this particular instance I should have backed the boat back and let the tide bring the boat to the wharf.

Q. Then you think that the landing as made was proper under the circumstances?

A. I think that the way in which he made his landing was a proper way.

Q. State what is the proper position of a wharfinger on such a wharf as the one at Shamrock when a vessel is approaching to make a landing—where he should stand to be reasonably safe.

A. If he expects to take a stern line he should stand on the lower comer, about 8 or 10 feet from the corner, so as to take the line around to the lowest part.

Q. How many wharves are there on the Potomac river?

A. When I was steamboating there I landed at Alexandria, Fort Foote, Fort Washington, White House, Glymont, Sandy Point, Smith's Point, Quantico, Liverpool Point, Stewart's, Tolson's, Piney Point, and Point Lookout.

The COURT: Which is the next landing above Tolson's after Stewart's—Liverpool Point?

A. No, sir; that is way up.

141 Mr. BIRNEY: The Tolson wharf he speaks of is on the Maryland side.

Mr. WILSON: The wharf in question is called the Shamrock.

The COURT: Which is the next above Stewart's, leaving out the Shamrock wharf?

The WITNESS: Coming up the river?

The COURT: Yes.

The WITNESS: On which side?

The COURT: Virginia side.

The WITNESS: There are no more on the Virginia side until you get up to Quantico.

The COURT: How far is that from Stewart's?

A. About 30 miles.

The COURT: Which is the next one on the Maryland side from Stewart's?

A. Smith's Point.

Q. How far is that above Stewart's?

A. That is right across, nearly; a little up the river from Shamrock.

142 Cross-examination:

By Mr. BIRNEY:

Q. At the time of making the landing ought not the pilot to be in the pilot-house?

A. No, sir.

Q. Ought not the captain to be in the pilot-house?

A. If the captain is making a landing he ought to be aft, and if the pilot is making a landing he ought to be aft.

Q. Then you think it good navigation for the wheel to be left to itself?

A. Navigation is not going on when you are making a landing.

Q. The tide is going on all the same at such a time?

A. Oh, yes.

Q. And operating upon the boat, is it not?

A. Certainly.

Q. Is there any other way of turning the boat or using the rudder and steering the boat than by the use of the wheel?

A. Well, the landing is made by the tide——

Q. I ask you whether you can steer a boat in any other way than by means of the wheel.

A. The wheel is intended to steer it with.

Q. The wheel operates directly upon the rudder?

A. Of course.

Q. And if there is nobody at the wheel there is no way by which the course of the vessel can be changed or the position of the rudder altered?

A. No, sir.

143 Q. There is no way of governing the motion of the vessel, the movements of the vessel, otherwise than by the wheel?

A. No, sir; we never leave the pilot-house until the vessel is in position to make a landing without any working of the wheels at all.

Q. We will come to that presently. Isn't it true that a steam-vessel pivots at the stern; that the movement is given it always from the stern?

A. I do not understand you.

Q. You do not understand?

A. Pivoted at the stern?

Q. Yes. Isn't there always a greater movement at the bow, owing to the fact that the steering apparatus is at the stern? Is not the first influence felt on the bow when at attempt is made to change a vessel's course?

A. Yes, sir.

Q. Then it pivots, as it were, on the stern, does it not?

A. The rudder is on hinges. You turn the rudder, and that turns the bow; at the same time that the bow goes one way the stern goes the other.

Q. And the stern is at the rear?

A. Yes, sir.

144 And the said BEECHUM, being duly sworn, testified as follows:

Q. What is your occupation?

A. I am captain of the George Leary.

Q. How long have you been on the river?

A. Since 1856.
Q. In what capacities?
A. In pretty nearly all.
Q. From the lowest to the highest?
A. Yes, sir.
Q. Do you know the John W. Thompson?
A. I do.
Q. Have you ever been employed on her?
A. I have been a mate on her.
Q. The Thompson is going up the river in September, with a flood tide about noon, on a clear calm day, and has gotten abre-st or a little beyond the Shamrock wharf in going up the river; a signal is made from the wharf for her to land. Will you state whether or not a stern landing is the reasonably proper and safe landing to be made under such circumstances?
The WITNESS: Do I understand you to say it was a calm day?

By the COURT:

Q. You know the wharf?
A. Yes, sir; I know the locality.

By Mr. BIRNEY:

Q. Have you ever been there?
145 A. No, sir; it is a new wharf, built since I have been on the river.

Mr. BIRNEY: I object. He does not even know the locality.
Mr. WILSON: Oh, yes; he says he knows the locality.
The WITNESS: I*n* know the locality.

By Mr. BIRNEY:

Q. Do you know the surroundings?
A. Yes, sir; I know the surroundings.

By Mr. WILSON:

Q. Do you know the depth of the water, the position of the wharf, and all that; where it is with reference to the channel, and where it is with reference to the land?
A. I should judge it was in about 9 or 10 feet of water.
Q. You can now answer the question I put to you awhile ago.
A. I should think the stern landing would be perfectly safe. I often make them.
Q. You often make them with the Leary?
A. Yes, sir; especially if you go by a wharf. You are not going to turn a steamer around and make a landing when you can make a stern landing. That is why we have an aft gangway, in order to be able to make a stern landing when it is necessary.

No cross-examination.

And the said HANIE, being called on behalf of the defendant and being sworn, testified as follows:

146 The COURT: He is your witness now, Mr. Wilson.
Mr. WILSON: Yes.

Q. You have already been examined?
A. Yes, sir.
Q. And you have been in court and have heard the testimony of Capt. Richards, the pilot of the John W. Thompson?
A. Yes, sir.
The COURT: You heard all of it?
The WITNESS: I suppose I did.
—. Will you state whether upon the facts stated by him in regard to the position of the Thompson—the winds and tides, and so on—if correctly stated, the landing as made by him was a reasonably safe and skilful one?
A. Yes, sir; in the way he explains it—in the way the boat was placed opposite the end of the wharf—in that case I should have probably landed the boat in the same way.

Cross-examination:

By Mr. BIRNEY:

Q. That is supposing the boat to be opposite the wharf, but suppose it to have passed the wharf.
A. I understood him to say the boat was nearly opposite the wharf; that the pilot-house had just passed the dock.
Q. Supposing the steamboat to have passed the wharf; to have gotten beyond it.
147 A. That is a question you asked me before. If the boat had passed the wharf and had gone beyond the wharf some distance, 300 or 400 yards—I think the evidence went to show that—then it would not be a safe way of landing the boat.
Q. Suppose it had gone a length beyond the wharf.
A. The- that would depend upon the distance out from the wharf.

And, further to maintain the issues on its part joined, the defendant asked the said witness Bonneville this further question, If, in his judgment, a position within two or three feet from the fender piles of a wharf constructed like the Shamrock pier was a reasonably safe place for a wharfinger to stand when a boat was approaching in order to take off freight or to make a landing. Objection was made to said inquiry by the plaintiff's counsel, and the court sustained said objection (because the said Bonneville had not shown himself to be a wharfinger) and refused to allow such question to be asked; to which said ruling of the court the defendant then and there excepted.

And thereupon the defendant rested its case, the foregoing being in substance all the testimony adduced on its behalf.

And, further to maintain the issues on his part joined, the plaintiff offered testimony in rebuttal tending to prove that the plaintiff did

not, on the said 15th day of September, 1883, or the day following or at any other time, admit or say that the said injuries were
148 caused by his own fault, or that defendant was not liable therefor, and did not give the explanation of said accident testified to by the defendant's witnesses.

And, further to maintain the issues on his part joined, the plaintiff gave further testimony in rebuttal tending to prove that the said pier was built in a good and substantial manner, and was well suited for the purpose for which it was intended; that the said six front piles were not loose when said pier was completed, but were driven close to the flooring of the pier and kept in place by cuts in the flooring about an inch and a half deep, conforming to the size and shape of the piles; that the plank lay hard against the said corner and front piles, and there was no space between said piles and the flooring; and, further, that it was not intended that boats should land at the front of said wharf, but at the two sides thereof, but it was admitted that other steamboats had frequently made landings at the front of said pier, and said piles were intended as braces to resist pressure. Said piles were driven into the river bottom about 12 or 15 feet. Said wharf was completed in June, 1883. Thereupon the plaintiff rested, the foregoing being in substance all the evidence adduced on behalf of the plaintiff in rebuttal.

Thereupon the plaintiff prayed the court to instruct the jury as follows:

1. If the jury find from the evidence that the plaintiff's foot was crushed as a consequence of a violent collision of the defendant's steamboat with Shamrock wharf, and further find that such collision was caused by negligent or unskilful management of said
149 steamboat by the defendant's servants in charge thereof, then their verdict should be for the plaintiff, unless they further find that the plaintiff was negligent, and that his negligence contributed to his said injury.

2. If the jury believe from the evidence that the steamer John W. Thompson at the time of the accident to plaintiff was being run and operated by the agents of the defendant, and the same at the time in question negligently or carelessly navigated by the said agents in making the landing at Shamrock wharf, and in consequence of such carelessness or negligence the plaintiff was injured without any fault or neglicence on his part, then the plaintiff is entitled to a verdict.

3. If the jury believe from the evidence that the wharf in question was an ordinarily strong and good one and suitable for the purpose for which it was constructed, and that in making the landing in question the boat was thrown against the wharf with such force as to tear up some of the planks or boards of the flooring, this would be *prima facie* evidence of negligence on the part of the agents of defendant under the circumstances in making said landing, and would justify the jury in so finding, unless upon the whole evidence such *prima facie* evidence is rebutted.

4. In determining whether the defendant's agents were guilty o

negligence in making the landing in question it would be proper for the jury to consider with the other facts and circumstances
150 shown in evidence whether, *unless* all the circumstances, it was dangerous to make a rear landing with that boat at that time at the wharf in question, and whether either the pilot or captain should not have been in the pilot-house during the making of said landing, and if they find from all the evidence that it was dangerous to make such landing under such circumstances this will be *prima facie* evidence of negligence on the part of defendant to justify them in so finding, unless such evidence is rebutted by the whole evidence in the cause.

5. If the jury find from the evidence that the plaintiff was standing near the edge of the wharf at the time the boat came in contact with it this would not in itself justify them in finding him guilty of contributory negligence, but is a question for the jury, under all the evidence and circumstances of the case, whether the plaintiff contributed to his own injury.

6. The jury are instructed that burden of proof to establish contributory negligence in the plaintiff is upon the defendant in this case.

7. By contributory negligence is meant such acts or omissions on the part of plaintiff as in part caused the injury complained of, and if the jury should believe that plaintiff did not act with due care, but should further find that such want of care was not in part the cause of the injury, then they are instructed that the defence of contributory negligence has not been made out.

151 8. If the jury find for the plaintiff, then they are instructed that in estimating the damages to be awarded they should take into consideration the mental and physical suffering which they may find the plaintiff has sustained from his injuries, the disability from transacting his business which they may find such injury has caused him, and the amount he may have proved he has laid out in the attempted cure of his injury; and if they further find from the evidence that the injury is one from which the plaintiff will hereafter suffer and which will hereafter disable him, they will be entitled, in estimating the damages, to consider these facts and compensate the plaintiff therefor.

And thereupon the defendant prayed the court to instruct the jury as follows:

1. The jury is instructed that upon the whole evidence the plaintiff is not entitled to recover in this action.

2. If the jury shall find from the whole evidence that in approaching and making the landing at the pier called Shamrock at the time described in the declaration the persons in charge of the defendant's steamboat, John W. Thompson, exercised reasonable skill and care, plaintiff is not entitled to recover in this action.

3. In order to entitle the plaintiff to recover in this action
152 it is incumbent on the plaintiff to prove to the satisfaction of the jury that in approaching and landing at the plaintiff's wharf at the time described in the declaration the defendant did not

exercise reasonable care and skill, and also that the plaintiff did, while said boat was approaching and landing at and departing from said pier, exercise the care and prudence that a prudent and careful man acquainted with the business of a wharf agent and the dangers of that situation would have exercised under similar circumstances.

4. If the jury find from the whole evidence that the injuries described in the plaintiff's declaration were caused by the negligence or carelessness of plaintiff, the plaintiff is not entitled to recover in this action, although they shall further find that in landing at or departing from the pier called Shamrock at the time described in the declaration the defendant's boat was not managed by the defendant's servants with skill and care.

5. In determining what kind or degree of care or prodence it was the duty of the plaintiff to exercise while the defendant's boat was approaching or landing at or departing from the pier called Shamrock the jury is instructed that it was incumbent on the plaintiff to exercise the care and prudence that a prudent man with a knowledge of the business of a wharfinger would have exercised under similar circumstances.

The care and prudence which it was the duty of the plaintiff
153 to exercise while the defendant's boat was touching at or departing from the pier called Shamrock is in proportion to the danger of the employment in which he was engaged; and if the jury shall find that such employment was in a high degree dangerous it was the duty of the plaintiff to exercise extreme care.

6. If the jury shall find from the whole evidence that at the time the defendant's boat was landing at the pier Shamrock the plaintiff negligently or carelessly placed his left foot between the piles of said pier or between the piles and the flooring of said pier or between one of the piles in front of said pier and the flooring thereof and allowed it to remain there while the boat was departing from said pier, and the foot so placed was injured while in that position, then the plaintiff is not entitled to recover in this action.

7. If the jury shall find from the whole evidence that at the time the defendant's boat was landing at the pier Shamrock the plaintiff placed his left foot between the piles of said pier and the flooring of said pier or between one of the piles in front of said pier and the flooring thereof and allowed it to remain there while the boat was departing from said pier, and the foot so placed there was injured while in that position, then the plaintiff is not entitled to recover in this action.

8. If the jury shall find from the whole evidence that as the defendant's boat was approaching the pier Shamrock at the time
154 described in the declaration the plaintiff said to the defendant's servants in charge of said boat that it was not necessary to throw out a line or to make fast to said pier, and as said boat was nearing said pier voluntarily undertook to put on board said boat or to hand to defendant's servants on said boat the basket and demijohn referred to in the testimony by leaning over the edge of said pier, and received the injuries complained of while in that position, the plaintiff is not entitled to recover in this action.

9. If from the whole evidence the jury is unable to determine whether the injuries complained of in the plaintiff's declaration were caused by the negligence of plaintiff or by the negligence of defendant's servants, the verdict of the jury must be for the defendant.

10. The plaintiff cannot recover in this action punitive or vindictive damages.

The court thereupon granted the prayers and each of the said prayers asked on behalf of the plaintiff.

And the court granted the second, fourth, sixth, ninth, and tenth of said prayers asked on behalf of the defendant, but refused the first third, fifth, seventh, and eight- of said prayers asked on behalf of defendant, and instead and in the place of said fifth prayer gave the following instructions as a modification of said fifth prayer asked by the defendant, as follows:

155 "In determining what kind of degree of care or prudence it was the duty of the plaintiff to exercise while the defendant's boat was approaching or landing at or departing from the plaintiff's wharf, the jury is instructed that it was incumbent on the plaintiff to exercise the care and prudence that a prudent man with a knowledge of the business of a wharfinger would have exercised under similar circumstances. The care and prudence which it was the duty of the plaintiff to exercise while the defendant's boat was touching at or departing from the plaintiff's wharf is in proportion to the danger of the employment in which the plaintiff was engaged, and if the jury find that such employment was attended with danger it was the duty of the plaintiff to exercise care and caution in proportion to such danger."

And — the giving of said first, second, third, fourth, fifth, sixth, seventh, and eighth instructions as prayed by the plaintiff, and each of them, and the several refusals of the court to grant the said first, third, fifth, seventh, and eighth of said instructions as prayed by the defendant, and to the *garntinf* of said instruction in the place and stead of said fifth instruction as modified, and each and every of them, the defendant then and there, before the jury retired to consider their verdict, severally excepted.

156 And thereupon the court further instructed and charged the jury as follows:

GENTLEMEN OF THE JURY: This case has been so fully argued that I really have no excuse for detaining you any considerable length of time. I propose to say a word or two only by way of explaining the general scope of these prayers.

The plaintiff's sole ground for recovery is that the defendant was guilty of negligence. The burden of proof is on the plaintiff to sustain this allegation.

The grounds upon which the plaintiff would have you conclude there was negligence of the part of the defendant in such particulars as to cause the injury which he suffered (for that must be the kind of negligence shown to have been committed) are:

First. That it was a negligent and unsafe thing for the steamboat, under the circumstances of the tide, the position of the boat with re-

spect to the wharf and all the surroundings, to endeavor to make a rear landing.

Second. That there was a failure on the part of the steamer to stop at the wharf, as was its custom and as it should have done in this case, and that it should have stopped and made fast at the wharf when it returned, notwithstanding the alleged remark
157 of the plaintiff to the officers of the boat that it was not necessary to do so, as he could put on board the two small packages he had without the line being thrown out.

Third. That there was no pilot or substitute for a pilot in the pilot-house at the time of the landing to govern the movements of the boat as the exigencies of the case might require.

Fourth. The violent manner in which the landing was made, causing a concussion which broke up parts of the wharf and which resulted in the injury to the plaintiff that is complained of.

All these allegations of negligence are, of course, denied by the defendant or, at any rate, to the extent claimed by the plaintiff. It will perhaps be safe to say that they are all denied.

The defendant says, in answer to the allegations of the plaintiff, that it was not unsafe to make a landing under the circumstances that it was made; that it was not unsafe to transact that business without stopping at the wharf, the plaintiff volunteering to place the two packages aboard without a line being thrown out; that there was no necessity for a pilot being in the pilot-house at the particular time of the landing, the wheel being placed in a fixed position for the time being.

158 The plaintiff, to maintain his view, has called a number of witnesses who have testified as to what they saw and heard on the occasion. The defendant has done the same. Those witnesses were necessarily confined to a statement of the facts as they observed them, and were not allowed to give their opinions. There is a class of witnesses, however, who have a right to give opinions for the purpose of guiding the jury to a correct formation of judgment where questions of skill, science, and art are involved, inasmuch as jurors are not supposed to be well acquainted with technical matters. It is only such witnesses as are especially familiar with such branches of science and art who are thus permitted to testify.

Both the plaintiff and the defendant have produced witnesses of this character, and it is for you, upon the whole evidence, to determine whether or not the plaintiff has sustained his allegations of negligence on the part of the defendant.

If you find the defendant was not guilty of negligence, that ends the case. If you find that the defendant was guilty of negligence, then a second point of inquiry arises, whether the plaintiff was also guilty of negligence and whether his negligence contributed to the injury. If you find that the plaintiff was guilty of negligence, and that such negligence directly contributed to the injury, then it is not important to inquire how far such negligence contributed to it; for if he contributed to it at all, that would incapacitate the plaintiff from recovering.

159 The burden of the proof is, however, upon the defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury.

The principal grounds upon which it is claimed by the defendant that the plaintiff was himself negligent are:

First. His standing in a dangerous position on the front part of the wharf.

Second. His causing a failure on the part of the boat to throw out its line and stop by requesting or suggesting that there was no necessity to do so inasmuch as he had only two small packages to put on board.

The principal ground of negligence, however, as I understand it, that is insisted upon by the defendant as contributing to the injury was the plaintiff's placing his foot in a dangerous position on the wharf when he must have known that the effect of the boat striking would be to crush his foot.

The seventh instruction of the defendant, granted by the court, presents that view of the case on behalf of the defendant in its full force.

That instruction is as follows:

7. If the jury shall find from the whole evidence that at the time the defendant's boat was landing at the pier Shamrock the plaintiff negligently or carelessly placed his left foot between the piles of said pier or between the piles and the flooring of said pier or between one of the piles in front of said pier and the flooring thereof
160 and allowed it to remain there while the boat was departing from said pier and the foot so placed was injured while in that position, then the plaintiff is not entitled to recover in this action.

This is the only instruction in which I have undertaken to say to the jury what act of the plaintiff would disentitle him from recovering.

This is upon the hypothesis that you shall first find the facts spoken of and then that the plaintiff negligently or carelessly placed his foot in the position referred to. It, however, still leaves with you the question, if you should find he did place his foot in such position, whether or not his act in doing that was such negligence as would disentitle him from recovering.

There is a principal which you will bear in mind in regard to that. It is this: That a person in the position of the plaintiff is to keep his wits about him, to be on the alert so as not to be injured, and to exercise such vigilance or care as is proportionate to the hazard of the duty in which he is engaged. For instance, a man should be more cautious if he is running a dangerous engine that if he is sitting, as you are now, in a position of safety and attending to his usual avocation. His care must be in proportion to the hazard of his engagement.

There is no proof here to show that this was a dangerous vocation—standing there attending to that wharf—and yet, nevertheless, there were certain hazards accompanying it, just as there are in

almost all positions. One of you, for instance, might lean
161 over in your chair in such a way as to fall and cut your head, but it is not likely that you will.

There is another view of the matter. A person situated as the plaintiff is in respect of the defendant is authorized to suppose that the servants of the defendant—the officers of the steamboat—are going to exercise proper care in the handling of the boat rather than act negligently.

There is a difference of recollection on the part of various witnesses as to whether this boat touched or struck the pier when it was backing or when it was going forward, and also a difference as to whether this basket and possibly the demijohn was handed over before the boat struck the pier in coming back.

You are to consider that in this point of view. If you should find that all the business that Tolson had with the boat had been transacted before the boat struck the pier and the boat had left the position in which it was when these articles were thus delivered, then you are to take into consideration whether Tolson was obliged to conclude that the boat, having done its business at the wharf, was likely to come again and touch the wharf. If the condition of things was such that the probability was that it would, then, of course, more caution would reasonably be expected to be exercised by him to get into a safe position than if he had reason to suppose that, having transacted all its business, the boat would return no more to that wharf.

162 I cannot, perhaps, better state this rule about contributory negligence than in this way:

Negligence is the want of such care as men of ordinary prudence would adopt under similar circumstances, and the question whether the act of the plaintiff amounted in law to negligence depends upon the danger which might reasonably be expected to result therefrom. If the danger was so great that no sensible man would have incurred it the plaintiff will not be entitled to recover. It is proper to remind you, by way of explaining to some extent, the difference of recollection on the part of witnesses on both sides as to what occurred; that this whole affair must have passed in a moment of time, and therefore it is quite natural that persons should differ in their recollection or impressions as to what actually did take place.

Something has been said on both sides as to the weight which is to be given to Tolson's statements made here of what passed in view of Tolson's statements said to have been made elsewhere to Mr. Grimes and others. It may at first seem surprising that a man who himself wears the shoe should not be able to tell where it pinches; that a man who has his foot crushed should not necessarily know better than any other party where it was hurt and how it was hurt, and yet it is not an uncommon thing for other men who saw the thing done to be able to tell better than the man himself how the accident happened. The shock and the pain may have the effect of rendering the man quite incapable of telling just exactly
163 how the thing took place. So, if you find the man at different times making somewhat different statements, it does not

at all follow that his intention was to mislead. You are therefore to look at any difference of statements that he may have made, if you believe he did make different statements, in that point of view. He may not be the best witness as to what did happen*ed* to himself or the manner in which the thing may have happened.

There is another qualification of this rule of negligence which it is proper I should mention. Although the rule is that even if the defendant be shown to have been guilty of negligence the plaintiff cannot recover, if he himself be shown to have been guilty of contributory negligence, which may have had something to do in causing the accident, yet the contributory negligence on his part would not exonerate the defendant and disentitle the plaintiff from recovering if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequence of the plaintiff's negligence.

I believe I have given in your presence an illustration of this principle, but I will repeat it here. If, for instance, a person driving a coach very rapidly up Pennsylvania avenue runs over a man not looking about him that would be supposed to be negligence; but if it turned out that the party whom he run over was lying in the roadway drunk that would be evidence of such contributory negligence on the part of the injured man, and he would
164 not be entitled to recover in an action. There comes in this qualification, however: Notwithstanding the fact that the man was lying on the roadway drunk, if the man driving the coach saw him there and could, by the exercise of ordinary care and diligence, have avoided running over him, but did not do it, then he cannot shelter himself behind the plea of contributory negligence on the part of the injured party.

Gentlemen, the instructions asked for by counsel on either side and which I have granted are all in writing, and you can take them to your room.

Mr. COLE: If your honor please, before you give the case to the jury I would like to have you say to them (although I believe it is covered by the prayers that have already been granted) that even if the jury should believe from the evidence that it was not negligent to make a rear landing, yet if they believe that the landing was made in a negligent manner, the defendant would be guilty of negligence.

In other words, if they should find that it was not negligence not to have a pilot at the pilot-house at the time of this landing—not negligence on the part of the steamer in making a rear landing or in making a rear landing badly—yet if they find that in making the rear landing they made it in a negligent manner the plaintiff would be entitled to recover.

The COURT: There is a prayer to that effect. What I have endeavored to do has been to state the different acts which you claim constitute negligence. I have stated them in this wise: That I understand the plaintiff to insist that there was negligence, first,
165 in making a rear landing at all under the circumstances; second, in leaving the pilot-house without a pilot to control

the movements of the boat, and, third, in not stopping at the wharf—that was not so distinctly presented in the evidence, but I understood that to be a point made in the argument of counsel—and, fourth, in the violence of the concussion.

And to so much of said instruction as states the acts of negligence and unskillfulness upon which the plaintiff relies to recover in this action, and submits the same for the determination of the jury, and is expressed in the following words:

"The grounds upon which the plaintiff would have you conclude there was negligence on the part of the defendant in such particulars as to cause the injury he suffered (for that must be the kind of negligence shown to have been committed) are, first, that it was a negligent and unsafe thing for the steamboat, under the circumstances of the tide, the position of the boat with respect to the wharf, and all the surroundings, to endeavor to make a rear landing; second, that there was a failure on the part of the steamer to stop at the wharf, as was its custom and as it should have done in this case, and that it should have stopped and made fast at the wharf when it returned, notwithstanding the alleged remark of the plaintiff to the officers of the boat that it was not necessary to do so, as he could put on board the two small packages he had without the line being thrown out; third, that there was no pilot or
166 substitute for a pilot in the pilot-house at the time of the landing to govern the movements of the boat as the exigencies of the case might require; fourth, the violent manner in which the landing was made, causing the concussion which broke up parts of the wharf and which resulted in injuries to the plaintiff as is complained of. All these allegations of negligence are, of course, denied by the defendant, or, at any rate, to the extent claimed by the plaintiff. It will perhaps be safe to say that they are all denied. The defendant says, in answer of the allegation of the plaintiff, that it was not unsafe to make a landing under the circumstances that it was made; that it was not unsafe to transact that business without stopping at the wharf, the plaintiff volunteering to place the two packages aboard without a line being thrown out; that there was no necessity for a pilot being in the pilot-house at the particular time of the landing, the wheel being placed in a fixed position for the time being. The plaintiff, to maintain his view, has called a number of witnesses, who have testified as to what they saw and heard on the occasion. The defendant has done the same. Those witnesses were necessarily confined to a statement of the facts as they observed them, and were not allowed to give their opinions. There is a class of witnesses, however, who have a right to give opinions for the purpose of guiding the jury to a correct formation of judgment where questions of skill, science, and art are in-
167 volved, inasmuch as jurors are not supposed to be perfectly well acquainted with technical matters. It is only such witnesses as are especially familiar with such branches of science and art who are thus permitted to testify. Both the plaintiff and the defendant have produced witnesses of this character, and it is for you, upon the whole evidence, to determine whether or not the

plaintiff has sustained the allegations of negligence on the part of the defendant"—the defendant then and there and before the jury retired excepted.

168 And to so much of said instructions to the jury by the court as charged that the burden of proof is upon the defendant to show that the plaintiff was negligent, and is expressed in the following words:

"The burden of proof is, however, upon the defendant to show that the plaintiff was negligent and that his negligence contributed to the injury"—the defendant then and there and before the jury retired excepted.

And to so much of said instruction as charged that the jury were to determine whether or not the act of the plaintiff in placing his foot in the position described in the seventh of the said prayers asked by the defendant was such negligence as would prevent plaintiff from recovering, and is expressed in the following words:

"The principal ground of negligence, however, as I understand it, that is insisted upon by the defendant as contributing to the injury was the plaintiff's placing his foot in a dangerous position on the wharf where he must have known that the effect of the boat striking the wharf would be to crush his foot. The seventh instruction of the defendant granted by the court presents that in view of the case on behalf of the defendant in its full force. This is the only instruction in which I have undertaken to say to the jury what act of the plaintiff would prevent him from recovering. This is upon the hypothesis that you shall first find the facts spoken of and

169 then that the plaintiff negligently or carelessly placed his foot in the position referred to. It, however, still leaves with you the question, if you shall find he did place his foot in such position, whether or not his act in doing that was such negligence as would prevent him from recovering"—the defendant then and there and before the jury retired excepted.

And to so much of said instruction as charged that there was no proof that the busines- of the plaintiff was a dangerous vocation, and is expressed in the following words:

"There is not proof here to show that this was a dangerous vocation, standing there attending to that wharf, and yet, nevertheless, there were certain hazards accompanying it, just as there are in almost all positions. One of you, for instance, might lean over your chair in such a way as to fall and cut your head, but it is not likely that you will"—

The defendant then and there and before the jury retired excepted.

And to so much of said instruction expressed in the following words:

"There is a difference of recollection of the part of the various witnesses as to whether this boat struck the pier when it was backing or going forward, and also a difference as to whether this basket and possibly the demijohn was handed over before the boat struck the pier in coming back. You are to consider that in this point of

view. If you should find that all the business that Tolson
170 had with that boat had been transacted before the boat struck the pier, and the boat had left the position in which it was when these articles were thus delivered, then you are to take into consideration whether Tolson was obliged to conclude that the boat, having done its business at the wharf, was likely to come again and tough the wharf. If the condition of things was such that the probability was that it would, then, of course, more caution would reasonably be expected to be exercised to get into a safe position than if he had reason to suppose that, having transacted all its business, the boat would return no more to the wharf"—

The defendant then and there and before the jury retired excepted.

And to — much of said instruction as relates to the weight to be given to the statements made by Tolson shortly after the injuries happened of which complaint is made, and is expressed in the following words:

"Something has been said on both sides as to the weight which is to be given to Tolson's statements made here of what passed, and as to Tolson's statements said to have been made to Mr. Grimes and others. It may at first seem surprising that a man who himself wears the shoe should not be able to tell where it pinches; that a man who has his foot crushed should not necessarily know better than any other party where it was hurt and how it was hurt, and yet it is not an uncommon thing for other men who saw the
171 thing done to be able to tell better than the man himself how the accident happened. The shock and pain may have the effect of rendering the man quite incapable of telling just exactly how the thing took place, so if you find the man at different times making somewhat different statements it does not at all follow that his intention was to mislead. You are, therefore, to look at any difference of statements that he may have made, if you believe he did make different statements, in that point of view. He may not be the best witness as to what did happen to himself or the manner in which the thing may have happened"—

The defendant then and there and before the jury retired excepted.

And to so much of said instruction as charges that contributory negligence on the part of the plaintiff would not exonerate the defendant if by the exercise of reasonable care and prudence the defendant might have avoided the consequences of the plaintiff's negligence, expressed in the following words:

"There is one qualification of this rule of negligence which it is proper I should mention, although the rule is that if the defendant be shown to have been guilty of negligence the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, yet the contributory negligence on his part would not exonerate the defendant and disentitle the plaintiff from recovering
172 if it be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences

of the plaintiff's negligence. I believe I have given in your presence an illustration of this principle, but I will repeat it here. If, for instance, a person driving a coach very rapidly up Pennsylvania avenue runs over a man not looking about him, that would be supposed to be negligence; but if it turned out that if the party whom he run over was lying on the roadway drunk, that would be contributory negligence on the part of the man, and he would not be entitled to recover in this action. There is this qualification, however, notwithstanding the fact that the man was lying in the roadway drunk, if the man driving the coach saw him there and could, by the exercise of ordinary care and diligence, have avoided running over him and did not do it, he cannot shelter himself behind the plea of contributory negligence on the part of the other party"—

The defendant then and there and before the jury retired excepted.

And to so much of said instruction as charged that if the jury should find that it was not negligent not to have a pilot at the pilot-house at the time of the landing, nor negligent on the part of the steamer in making a rear landing or in making a rear landing badly, yet if the jury find that in making the rear landing badly the defendant made it in a negligent manner, the plaintiff would be entitled to recover, given in response to the following request by the counsel for the plaintiff:

173 "If your honor please, before you give the case to the jury I would like to have you say to them, although I believe it is covered by the prayers that have been already granted, that even if the jury should believe from the evidence that it was not negligent to make a rear landing, yet if they believe that the landing was made in a negligent manner, the defendant would be guilty of negligence. In other words, if they should find that it was not negligence not to have a pilot at the pilot-house at the time of this landing, not negligence of the part of the steamer in making a rear landing or in making a rear landing badly, yet if they find that in making the rear landing badly they made it in a negligent manner, complainant would be entitled to recover," and expressed in the following words:

"There is a prayer to that effect. What I have endeavored to do has been to state the different acts which you claim constitute negligence. I have stated them in this wise, that I understood the plaintiff to insist that there was negligence, first, in making a rear landing at all under the circumstances; second, in leaving the pilot-house without a pilot to control the movement of the boat; and, third, in not stopping at the wharf. That was not so distinctly represented in the evidence, but I understand that to be a point made in the argument of counsel; and, fourth, in the violence of concussion"—the defendant then and there, and before the jury retired, excepted.

174 Thereupon the defendant tendered to the court this his bill of exceptions, and prayed that the same should have the same force and effect as to the several rulings therein contained and excepted to as if said rulings were severally and separately incor-

porated in different bills of exception, which is by the court allowed, and this bill of exceptions is accordingly, before the jury retire to consider their verdict, signed and sealed this 12th day of February, 1887, now for then.

A. B. HAGNER. [SEAL.]

175 MONDAY, *April* 25, 1887.

Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing on the fourth Monday, twenty-fifth day, of April, 1887.

Present: Presiding, Hagner; James, Cox, and Merrick.

* * * * * * *

MONDAY, *July* 11, 1887.

Session resumed pursuant to adjournment.

Present: Chief Justice Bingham and Associate Justices James, Montgomery, and Merrick.

* * * * * * *

176 FRANCIS A. TOLSON, Plaintiff,
vs.
THE INLAND AND SEABOARD COASTING COMPANY, Defendant. } No. 25170. At Law.

Now again come here as well the plaintiff as the defendant, by their respective attorneys; whereupon, it appearing to the court that the defendant's exceptions to the admissibility of evidence and the rulings and instructions of the court in special term were not well taken, and the defendant, by its counsel, having in open court abandoned its various appeals and applications for new trial on other grounds, the motion for a new trial on exceptions is now overruled and the judgment of the court in special term is affirmed with costs; and it is further adjudged that the plaintiff recover upon his said judgment, to wit, the sum of eight thousand dollars, as of the date of the said judgment of the special term, and the costs, as well against the said defendant as against Henry
177 A. Willard, John W. Thompson, Samuel Norment, and J. H. Baxter, its sureties on said appeals to this court, and have execution against them and each of them

By the court:

E. F. BINGHAM,
Chief Justice.

178 In the Supreme Court of the District of Columbia, the 18th Day of July, 1887.

FRANCIS A. TOLSON
vs.
INLAND & SEABOARD COASTING COMPANY. } No. 25170. In Error.

Know all men by these presents that we, The Inland & Seaboard Coasting Company of the District of Columbia, principal, and Samuel

Norment, as surety, are bound unto the above-named Francis A. Tolson in the sum of seventeen thousand dollars ($17,000), to be paid to the said Francis A. Tolson, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this eighteenth day of July, 1887.

Whereas the above-named The Inland & Seaboard Coasting Company of the District of Columbia has prosecuted its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named The Inland & Seaboard Coasting Company of the District of Columbia shall prosecute its said writ to effect and answer all damages and costs if it shall fail to make good *his* plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] THE INLAND & SEABOARD COASTING COMPANY OF THE DISTRICT OF COLUMBIA,
By SAMUEL NORMENT, *V. President.* [SEAL.]
SAMUEL NORMENT. [SEAL.]

Sealed and delivered in presence of—
E L. WHITE.

Attest: ALFRED WOOD, *Sec'y.*

To operate as a supersedeas upon appeal, this bond is approved.
WM. M. MERRICK, *A. J.*

July 20th, 1887.

This bond is satisfactory to me.

A. A. BIRNEY,
Of Pl'ff's Counsel.

179 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Francis A. Tolson, plaintiff, and The Inland and Seaboard Coasting Company, defendant, and Henry A. Willard, John W. Thompson, Samuel Norment, and J. H. Baxter, sureties, being No. 25170, at law, a manifest error hath happened, to the great damage of the said defendant & sureties, as by their complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning

the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 20 day of July, in the year of our Lord 1887, and of the Independence of the United States the one hundred and twelfth.

Seal Supreme Court of the District of Columbia.

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To Francis A. Tolson:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Inland and Seaboard Coasting Company is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness E. F. Bingham, chief justice of the said supreme court of the District of Columbia.

E. F. BINGHAM,
Chief Justice.

Service acknowledged this 21st July, 1887.

BIRNEY & BIRNEY,
Att'ys for Defendant in Error.

180 AUTHENTICATION OF RECORD.

Clerk's Certificate.

Clerk's office, supreme court of the District of Columbia.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 21st day of July, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 21 day of July, 1887.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 21 day of July, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: District of Columbia supreme court. No. 229. The Inland & Seaboard Coasting Company and Henry A. Willard, John W. Thompson, Samuel Norment, and J. H. Baxter, plaintiffs in error, *vs.* Francis A. Tolson. Filed October 14, 1887.